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# Daigle v. Clernco Industries: Panacea or Pandora's Box?

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## *Daigle v. Clemco Industries*: Panacea or Pandora's Box?

*Daigle v. Clemco Industries*<sup>1</sup> ended serious dispute regarding the lawfulness of wrongful death settlements executed prior to the death of the tort victim. Although one court had concluded these settlements were against public policy, *Daigle* cured potential defects relating to the object and cause of these instruments. In so doing, the *Daigle* court has created a new set of consent issues which may endanger the finality of existing settlements.

### I. FACTS AND DECISION

In 1976, Daniel Daigle filed suit for injuries caused by job-related exposure to industrial abrasives.<sup>2</sup> Daigle settled his personal injury claim in 1979. Defendants' settlement payment was conditioned upon the execution of full releases by Mr. Daigle's wife and children.<sup>3</sup> Mr. Daigle died on May 11, 1988. When decedent's wife and children filed an action in wrongful death, defendants excepted, arguing the 1979 settlement agreements barred the action. The first circuit reversed the trial court's denial of the exceptions,<sup>4</sup> and the Louisiana Supreme Court affirmed.<sup>5</sup>

In affirming, the Louisiana Supreme Court dismissed the wrongful death action, giving res judicata effect to the settlement executed by plaintiffs prior to Mr. Daigle's death.<sup>6</sup> In sustaining defendants' peremptory exception, the court rejected *Schiffman v. Service Truck Lines, Inc.*,<sup>7</sup> which held anticipatory releases of wrongful death claims violated public policy.<sup>8</sup>

While the court's rationale in repudiating *Schiffman* is compelling, the *Daigle* opinion fails to resolve critical issues of contractual consent raised by the parties and the appellate court. The purpose of this note is to identify and elaborate upon these issues, and to demonstrate the potential problems resulting from the court's failure to dispose of them.

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1. 613 So. 2d 619 (La. 1993).

2. *Daigle v. Clemco Indus.*, 593 So. 2d 1282, 1284 (La. App. 1st Cir. 1991), *aff'd*, 613 So. 2d 619 (1993). Daigle worked for six years as a sandblaster and painter. His diagnosed condition, pulmonary silicosis, resulted from long-term contact with crystalline free silica. *Daigle*, 613 So. 2d at 621.

3. *Daigle*, 613 So. 2d at 621. Decedent's wife, the named plaintiff, executed a release of her claims on the same instrument as decedent, which instrument was dated October 11, 1979. Previously, decedent's children had executed a release on September 18, 1979. As the court noted, these releases were executed with counsel present. *Id.*

4. *Daigle*, 593 So. 2d 1282.

5. *Daigle*, 613 So. 2d 619.

6. *Id.* at 620-21.

7. 308 So. 2d 824 (La. App. 4th Cir. 1974).

8. *Id.* at 827. The fourth circuit analogized pre-death settlements to contracts dealing in the succession of a living person, which Louisiana Civil Code articles 984, 1976 (former Article 1887), and 2454 prohibit. *Id.* at 826-27.

At issue in *Daigle* was the validity of the 1979 settlement agreement, signed by both Mr. and Mrs. Daigle, and the accompanying release by the Daigle children. Plaintiffs argued *Schiffman* voided all such instruments as having a prohibited object and a result contrary to public policy. Ultimately, the court denounced *Schiffman*, emphasizing the propriety of the instrument's object and the lawfulness of its cause.<sup>9</sup>

The *Daigle* court first noted both the broad freedom of contract established by Louisiana Civil Code article 1971,<sup>10</sup> and the limit on that freedom in the area of successions imposed by Article 1976.<sup>11</sup> This limit does not apply to an anticipatory release of this type, however. The court distinguished plaintiffs' agreements:

The future thing that was the subject of the settlement was the prospective wrongful death right of action that the tort victim's spouse and children would acquire in the event that . . . Daigle . . . died as a result of the particular tortious conduct described in the settlement. The succession of Mr. Daigle was not an object of the settlement contract; nor was the succession of any other living person.<sup>12</sup>

The court digressed into the codal bases for compromises, concluding those provisions support virtually all such agreements.<sup>13</sup>

The court also addressed the cause of the agreement. *Schiffman* held pre-death settlements of potential wrongful death claims contrary to public policy<sup>14</sup> and thus void for unlawful cause.<sup>15</sup> The *Daigle* court refused to adopt this approach:

Considering that the legislature chose not to create an exception to the broad freedoms of contract and compromise with respect to actions for future wrongful deaths, as it did expressly in the case of sales of future successions, along with the great difference in the need for protection in each instance, we conclude that the type of compromise

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9. *Daigle*, 613 So. 2d at 623-24.

10. "Parties are free to contract for any object that is lawful, possible, and determined or determinable." La. Civ. Code art. 1971.

11. *Daigle*, 613 So. 2d at 622. La. Civ. Code art. 1976 reads: "Future things may be the object of a contract. The succession of a living person may not be the object of a contract other than an antenuptial agreement." See also La. Civ. Code art. 2454, which states: "The succession of a living person may not be sold."

12. *Daigle*, 613 So. 2d at 622.

13. *Id.* at 622-23. The court read the articles on transaction and compromise, La. Civ. Code arts. 3071-3083, and La. Civ. Code art. 2004 *in pari materia*. La. Civ. Code art. 2004 makes null any contractual provision that, in advance, limits liability for intentional or for physical injury caused another.

14. *Schiffman v. Service Truck Lines, Inc.*, 308 So. 2d 824, 827 (La. App. 4th Cir. 1974).

15. "An obligation cannot exist without a lawful cause." La. Civ. Code art. 1966. "The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy." La. Civ. Code art. 1968.

at issue here does not derogate from laws enacted for the protection of the public interest, violate a rule of public order, or produce a result prohibited by law or public policy.<sup>16</sup>

The supreme court devoted a substantial portion of *Daigle* to refuting the rationale in *Schiffman*.<sup>17</sup> The *Schiffman* court had premised its decision on an analogy between tort and successions law,<sup>18</sup> concluding that "[d]ealing in such rights is contrary to morals, moral conduct and public order . . ."<sup>19</sup> Justice Dennis, writing for the court, considered this analysis unpersuasive. Justice Dennis asserted:

The *Schiffman* majority opinion underestimated the importance and strength of the Civil Code principles establishing . . . liberty to compromise and avoid litigation regarding all types of controversy, including contingent or uncertain future differences . . . . After establishing a competent person's broad freedom to contract or compromise for any object, the legislature created one narrow exception to this franchise which does not apply to . . . any ordinary advance compromise of a wrongful death action.<sup>20</sup>

In addition to policy considerations, the *Daigle* court observed that several other courts had reached similar conclusions.<sup>21</sup>

Ultimately, *Daigle* settled disputes over the intrinsic validity of pre-death releases. In the aftermath of *Daigle*, however, otherwise valid agreements may be attacked on two consent grounds: circumstantial duress and undue influence.

## II. CIRCUMSTANTIAL DURESS

In *Daigle*, the first circuit noted its "grave concern with respect to such pre-death releases."<sup>22</sup> While conceding the utility of such releases, the court observed:

16. *Daigle*, 613 So. 2d at 624.

17. *Schiffman* was noted in Stephen D. Juge, Note, *Tort—Wrongful Death—Release of Claim Before Death of Victim*, 50 Tul. L. Rev. 720 (1976). At least one other author has criticized the *Schiffman* successions analogy. See H. Alston Johnston, III, *Obligations, The Work of the Louisiana Appellate Courts For the 1974-1975 Term*, 36 La. L. Rev. 375, 390 (1976). One federal court has rejected the *Schiffman* court's interpretation of Louisiana law. *Manguno v. Turner-Newell Ltd.*, Civ. a. No. 82-1570, 1991 WL 148129 (E.D. La. July 30, 1991).

18. See *supra* note 8.

19. *Schiffman v. Service Truck Lines, Inc.*, 308 So. 2d 824, 827 (La. App. 4th Cir. 1974).

20. *Daigle*, 613 So. 2d at 623-24 (citations omitted).

21. *Manguno v. Turner-Newell Ltd.*, Civ. a. No. 82-1570, 1991 WL 148129 (E.D. La. July 30, 1991); *F.W. Woolworth Co. v. Todd*, 231 P.2d 681 (Okla. 1951) (holding that the Oklahoma state constitution did not bar prospective settlements of potential wrongful death claims); *Petersen v. Kemper*, 18 N.W.2d 294 (S.D. 1945) (holding that a wrongful death action was included in a pre-death settlement of "any and all claims").

22. *Daigle v. Clemco Indus.*, 593 So. 2d 1282, 1288 (La. App. 1st Cir. 1991).

[T]he inherently emotional nature of such settlements has the potential to cause strife and discord within the family of the dying individual. Additionally, family members in some cases may feel extreme emotional pressure to release their potential causes of action for less than adequate consideration in order to facilitate the settlement of the dying individual's own claim for damages. The ability of those involved to intelligently and rationally execute a release of their future rights under such circumstances is far from ideal.<sup>23</sup>

This characterization of these situations led plaintiffs and seven of eight defendants to argue in brief to the supreme court the issue of duress by circumstance.<sup>24</sup>

Despite these arguments, the Louisiana Supreme Court did not address plaintiffs' duress claim. Perhaps the court declined to decide the issue because there was no evidence in the record to suggest duress.<sup>25</sup> Alternatively, the court may have determined that the claim had prescribed.<sup>26</sup> The court's implication that plaintiffs' consent was not completely voluntary suggests that courts might, in the future, entertain claims of circumstantial duress in prospective wrongful death settlements.

Louisiana obligations law permits rescission of a contract for duress.<sup>27</sup> Duress, as the comments to Louisiana Civil Code article 1959<sup>28</sup> explain, involves "violence or threats" against a contracting party such that the party's consent to the contract is not freely given. Implicit in this language, it seems, is that duress exists only when an *actor* coerces the unwilling party to consent. Thus, the traditional rule regarding duress disfavors rescission for duress caused by the *circumstances* surrounding the formation of the contract.<sup>29</sup> Recently,

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23. *Id.*

24. Plaintiffs' brief argued, without authority, that duress had "compelled" decedent's wife and children to sign the release. Brief for Appellants at 10-11, *Daigle v. Clemco Indus.*, 613 So. 2d 619 (La. 1993) (No. 92-CC-0604). One appellee brief noted that there was "no evidence to support this statement," and cited *Wilson v. Aetna Casualty & Sur. Co.*, 228 So. 2d 229 (La. App. 3d Cir. 1969), for the proposition that "fear of financial consequences does not constitute duress." Brief for Appellee Mine Safety Appliances Company at 3, *Daigle v. Clemco Indus.*, 613 So. 2d 619 (La. 1993) (No. 92-CC-0604).

25. See *supra* note 24.

26. Brief for Appellee Clemtex, Ltd. at 17, *Daigle v. Clemco Indus.*, 613 So. 2d 619 (La. 1993) (No. 92-CC-0604). Duress claims have a five-year prescriptive period commencing from the time the duress ceased. La. Civ. Code art. 2032.

27. "Consent may be vitiated by error, fraud, or duress." La. Civ. Code art. 1948.

28. Comment (b) to La. Civ. Code art. 1959 reads, in pertinent part: "This Article substitutes the term 'duress' for 'violence or threats,' the expression used in the source Articles . . . . In sum, 'duress' is a word of art or technical word . . . which expresses exactly what is meant by 'violence or threats' in C.C. Arts. 1850-1852 (1870)."

29. See *Wilson v. Aetna Casualty & Sur. Co.*, 228 So. 2d 229, 232 (La. App. 1st Cir. 1969) ("[Duress] connotes an actor performing an exterior act which gives rise to the duress, rather than the entire set of objective circumstances causing the victim to act as he does."). See also *Lewis v. Lewis*, 387 So. 2d 1206 (La. App. 1st Cir. 1980). In *Lewis*, the court examined the circumstances

however, appellate courts have shown a willingness to rescind contracts under circumstances that do not fit the traditional duress formula.

In *Dunham v. Anderson-Dunham, Inc.*,<sup>30</sup> the first circuit rescinded an employment contract on the ground that the corporate defendant's representative signed under duress. The trial court's finding of duress was sustained on appeal, despite its conclusion that the representative "was never actually threatened."<sup>31</sup> Further, the representative admitted "his job was not put on the line, nor was he threatened or coerced in any other manner."<sup>32</sup> Nevertheless, the *Dunham* court held that the "'continued insistence'" of the representative's employers, considered with the "totality of the evidence,"<sup>33</sup> constituted duress.

In *Standard Coffee Service Co. v. Babin*,<sup>34</sup> the fifth circuit set aside an agreement for similar reasons. Plaintiff sought to enforce an arbitration clause<sup>35</sup> against defendant Raymond Babin, one of its "route salesmen." The arbitration clause was part of an employment contract signed by Babin at a meeting with his employers. Despite conflicting evidence on the point, the *Standard Coffee* court concluded Babin had been threatened with termination.<sup>36</sup> The court made no suggestion that this threat was improper.<sup>37</sup> Rather, the court determined that being "faced with being deprived of his economic security" was the vitiating factor.<sup>38</sup>

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surrounding the signing of a community property settlement and determined that a reasonable person in Mrs. Lewis' position would not have felt threatened to sign. Although the court rejected economic duress as a ground to vitiate a contract, the opinion implied the circumstances surrounding the consent must be considered. However, there were also threats alleged on the husband's part.

30. 466 So. 2d 1317 (La. App. 1st Cir.), writ denied, 472 So. 2d 29 (1985).

31. *Id.* at 1321.

32. *Id.* at 1322.

33. *Id.* The facts in this case are complex. In-fighting among the representative's employers, the representative's thirty-three year employment with the company, and the "surprise" nature of the contract negotiations seems to have satisfied the trial judge that the representative's consent was lacking.

34. 472 So. 2d 124 (La. App. 5th Cir. 1985).

35. Louisiana has a strong public policy favoring arbitration clauses. See *National Tea Co. v. Richmond*, 548 So. 2d 930, 932 (La. 1989); *Mathews-McCracken Rutland Corp. v. City of Plaquemine*, 414 So. 2d 756, 757 (La. 1982); *Standard Co. v. Elliott Constr. Co.*, 363 So. 2d 671, 674 (La. 1978). Nevertheless, the *Standard Coffee* court rescinded the agreement for circumstantial duress. Similarly, a court might ignore the policy favoring transaction and compromise to void a prospective wrongful death settlement on duress grounds.

36. *Standard Coffee Serv. Co.*, 472 So. 2d at 126-27.

37. See La. Civ. Code art. 1962, which provides: "A threat of doing a lawful act or a threat of exercising a right does not constitute duress. A threat of doing an act that is lawful in appearance only may constitute duress." This article expresses the principles of articles 1850 and 1851 of the 1870 Civil Code. These provisions, now restated in Article 1959, were the court's basis for decision.

The Louisiana Supreme Court cited *Standard Coffee* approvingly in *Wolf v. Louisiana State Racing Comm'n*, 545 So. 2d 976 (La. 1989). The *Wolf* court rescinded a disputed agreement, but not on the ground of circumstantial duress. Rather, the court found that defendants' improper threats and superior bargaining position had coerced plaintiffs' consent. *Id.* at 980.

38. *Standard Coffee Serv. Co.*, 472 So. 2d at 127. The court employed a two-part test, evaluating the objective threat, and then determining whether that threat would vitiate the consent of a reasonable person with similar subjective characteristics. The trial court found Babin was "a healthy

More recently, the third circuit, in *Poole v. Ward*,<sup>39</sup> annulled a compromise<sup>40</sup> on the ground of circumstantial duress.<sup>41</sup> As in *Dunham* and *Standard Coffee*, no party was found to have made improper threats. Significantly, the court found that plaintiff's consent was wanting because of "personal medical difficulties," a concern for "her mother's health and sister's well being," and "the loss of her much loved and respected aunt."<sup>42</sup>

Other cases have held, as a matter of law, fear of emotional hardship or financial consequences does not give rise to a claim of duress. These cases fall generally into the categories of tort settlements,<sup>43</sup> community property settlements,<sup>44</sup> surrenders for adoption,<sup>45</sup> and general business contracts.<sup>46</sup> Typically, these cases contain bare assertions, devoid of analysis or authority, that circumstantial duress does not constitute a vice of consent.

Doctrinal writers have suggested circumstantial duress is sufficient ground to set aside a contract. Planiol's *Treatise on the Civil Law* indicates the effect of duress is more important than its source:

Strictly speaking, the word "duress" denotes the means of constraint used, and not the effect produced upon the mind of the victim . . . . It is, as a matter of fact, far more the fear felt by the victim of the violence than the exterior act which gave rise to it which constitutes the vice of consent.<sup>47</sup>

male and able to earn a living," and thus not without job alternatives; nevertheless, the court rescinded the agreement for circumstantial duress. *Id.*

39. 576 So. 2d 1089 (La. App. 3d Cir. 1991).

40. Although nominally a "donation," the act was construed with a subsequent agreement, wherein the parties agreed not to contest a materially unrelated succession. The third circuit affirmed the trial court's determination that the two documents constituted a compromise. *Id.* at 1090.

41. See La. Civ. Code art. 3079. Article 3079 provides "[A transaction or compromise] may . . . be rescinded in the cases where there exists . . . violence."

42. *Poole*, 576 So. 2d at 1093. Compare these circumstances to the first circuit's observation in *Daigle*, *supra* notes 22-23 and accompanying text, and the typical situation involving the impending death of a family member.

43. See, e.g., *Shepherd v. Allstate Ins. Co.*, 562 So. 2d 1099 (La. App. 4th Cir. 1990); *Wilson v. Aetna Casualty & Sur. Co.*, 228 So. 2d 229 (La. App. 1st Cir. 1969).

44. See, e.g., *Dornier v. Live Oak Arabians, Inc.*, 602 So. 2d 743 (La. App. 1st Cir.), *writ denied*, 608 So. 2d 177 (1992); *Adams v. Adams*, 503 So. 2d 1052 (La. App. 2d Cir. 1987); *Lewis v. Lewis*, 387 So. 2d 1206 (La. App. 1st Cir. 1980).

45. See *Wuertiz v. Craig*, 458 So. 2d 1311 (La. 1984); *Allen v. Volunteers of Am.*, 378 So. 2d 1030 (La. App. 2d Cir. 1979), *writ denied*, 381 So. 2d 509 (1980).

46. See *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191 (1900); *Wright v. Sabine River Auth.*, 308 So. 2d 402 (La. App. 3d Cir.), *writ denied*, 313 So. 2d 245 (1975).

47. 1 Marcel Planiol, *Treatise on the Civil Law*, pt. 1, § 277 (Louisiana State Law Institute trans., 12th ed. 1959). Planiol further states that if the party "under the influence of fear, decides to enter into a contract which he would not have accepted at another moment . . . consent is vitiated and the contract may be annulled." *Id.* § 278. It is this section which the court cites in *Wilson v. Aetna Casualty & Sur. Co.*, 228 So. 2d 229, 232 (La. App. 1st Cir. 1969), for the proposition duress requires an actor.

Although the use of the word "violence" suggests an actor, Planiol's emphasis is clearly on the impairment of the contracting party's free will. Emphasizing this impairment, a court could interpret this language to support a claim of circumstantial duress.

Another authority writes: "[I]f . . . consent is not freely given the contract should be annulled regardless of whether duress has been exerted by the other party or has resulted from distressing circumstances."<sup>48</sup> Furthermore, "[t]he social consequences of upholding the validity of contracts made by persons in distressing circumstances would be negative," since "more often than not, the other party is aware of such circumstances."<sup>49</sup> This suggests even "good faith" contracting parties might face the prospect of having their settlements rescinded.

Article 1963 of the Civil Code specifically bars actions in duress against third parties in good faith.<sup>50</sup> The classic example of the application of this provision is a loan for ransom.<sup>51</sup> The article prohibits rescission absent a relationship between the maker of the loan and the party demanding ransom. Article 1963 appears to militate against any claim of circumstantial duress against a party in good faith. The status of a party as defendant in a potential wrongful death action—that is, the party ultimately responsible for the plaintiff's emotional or financial hardship—suggests some connection between the party attempting to enforce the settlement and the circumstances alleged to vitiate plaintiff's consent to the settlement.<sup>52</sup>

An argument for rescission of a pre-death settlement can be based on this doctrine and an analogy to Article 1963. A defendant prospectively settling a wrongful death claim may not be in legal bad faith; presumably, however, the party alleged to have caused decedent's injuries has a fault-based connection with plaintiffs' distressing or necessitous circumstances. This connection, like the one requisite in Article 1963, might serve to preclude a defense of good faith. Thus, to describe a defendant in this situation as a "good-faith third party" is not entirely accurate.

Thus, any compromise relating to and executed during a family medical crisis may be subject to attack for circumstantial duress. Although the case law is indecisive on the point, there is ample authority there, and in civilian doctrine, to frustrate an unwary defendant's desire to avoid litigating a claim already settled.

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48. Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 95 (1989) (footnote omitted).

49. *Id.* at 96 (footnote omitted).

50. La. Civ. Code art. 1963 states: "A contract made with a third person to secure the means of preventing threatened injury may not be rescinded for duress if that person is in good faith and not in collusion with the party exerting duress."

51. See La. Civ. Code art. 1963 cmt. (b): "Under this Article, a contract of loan made for the purpose of paying ransom cannot be rescinded for duress if the lender is in good faith."

52. Compare La. Civ. Code art. 2055, which states: "Equity, as intended in the preceding articles, is based on the principle that no one is allowed to take unfair advantage of another . . ."

## III. UNDUE INFLUENCE

In the most concise framing of its holding, the *Daigle* court states: "[W]e conclude that the compromise of a prospective wrongful death claim has res judicata effect if there is no error, fraud, duress or *undue influence which vitiates the consent of the potential wrongful death beneficiary*."<sup>53</sup> Potentially, this statement creates, at least in the area of prospective wrongful death settlements, a new vice of consent—undue influence. However, it is unclear how the principle of undue influence ought to apply, if at all, in these situations.

Undue influence is a "common-law concept."<sup>54</sup> It has been defined as "[p]ersuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he . . . cannot act intelligently and voluntarily . . ."<sup>55</sup> According to the Restatement (Second) of Contracts, undue influence is a consensual defect applicable to all contracts.<sup>56</sup> Such undue influence, if present, renders the resulting contract voidable.<sup>57</sup> In addition to the requirement of "unfair persuasion," there must also exist between the victim and the offending party a relationship either of domination or confidence.<sup>58</sup> A comment to section 177 of the Restatement (Second) explains these requisite relationships:

The rule stated in this Section protects a person only if he is under the domination of another or is justified, by virtue of his relation with another in assuming that the other will not act inconsistently with his welfare. Relations that often fall within the rule include those of parent and child [and] husband and wife . . . . In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion . . . . However, the mere fact that a party is weak, infirm or aged does not of itself suffice, although it may be a factor in determining whether the required relation existed.<sup>59</sup>

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53. *Daigle v. Clemco Indus.*, 613 So. 2d 619, 620-21 (La. 1993) (emphasis added). Note that Article 1948 names only error, fraud and duress as vices of consent. See *supra* note 27.

54. Katherine S. Spaht, *The Aftermath of the "Revolution": 1990 Changes to the New Forced Heirship Law*, 51 La. L. Rev. 469, 487 n.92 (1991) (quoting the Louisiana State Law Institute's proposed comments to Civil Code article 1492 (1989)). See also *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894). The *Zerega* court noted: "Undue influence is an expression unfamiliar to civilians. It is borrowed from a system of law not prevalent in Louisiana, and it is there used in the same sense as captation and suggestion in the civil law." *Id.* at 606, 15 So. at 480 (citation omitted).

55. Black's Law Dictionary 1528 (6th ed. 1990). The entry continues:

For purpose of executing instruments, [undue influence] exists when there was such dominion and control exercised over [the] mind of [the] person executing such instruments, under facts and circumstances then existing, as to overcome his free agency and free will and to substitute [the] will of another so as to cause him to do what he would not otherwise have done but for such dominion and control.

*Id.* (citing Board of Regents v. Yarbrough, 470 S.W.2d 86, 92 (Tex. Ct. App. 1971)).

56. Restatement (Second) of Contracts § 177 (1979).

57. *Id.* § 177(2).

58. *Id.* § 177(1).

59. *Id.* § 177 cmt. a.

In Louisiana statutory law, references to undue influence are scarce.<sup>60</sup> Even more scarce are such references regarding a party's consent to an obligation. In 1991, the legislature adopted these concepts in the area of donations.<sup>61</sup> The new articles repealed the prohibition against admitting evidence as to "hatred, anger, suggestion or captation."<sup>62</sup>

In the context of donations, undue influence has four elements: (1) there must be a testator susceptible to influence;<sup>63</sup> (2) there must be an opportunity for such influence to be employed; (3) the party exercising the influence must have the disposition to do so; and (4) the resulting instrument must reflect the improper influence.<sup>64</sup> If courts are willing to apply this principle to pre-death settlements,<sup>65</sup> they will likely require that these elements exist.<sup>66</sup>

60. A search of the Westlaw database for the term "undue influence" reveals the following statutes: (1) La. R.S. 28:381(27)(c) (1989 & Supp. 1994) (defining the "legally adequate consent" of the mentally retarded as that given "voluntarily and free from coercion and undue influence"); (2) La. R.S. 37:1743(A) (Supp. 1994) (protecting classes defined as "vulnerable to undue influence" from direct solicitations by health care providers); (3) La. R. S. 37:2359(B)(8) (1988) (suspending psychologists' licenses for "exercising undue influence" to exploit their clients); (4) La. Code Civ. P. art. 122 (providing for change of venue for "undue influence of an adverse party"); (5) La. Code Crim. P. art. 622 (providing for change of venue when "undue influence" renders an impartial trial impossible); (6) La. Ch.C. art. 317 (same); (7) La. Ch.C. art. 807(B) (providing for change of venue in a delinquency proceeding when "undue influence" renders an impartial trial impossible) (8) La. Civ. Code art. 3530 (defining capacity of heir or legatee). See *infra* note 61 for Civil Code articles on undue influence in donations *inter vivos* and *mortis causa*.

61. See 1991 La. Acts No. 363, § 1. La. Civ. Code art. 1479 states: -

A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.

Three other articles deal with specific aspects of nullification for undue influence: La. Civ. Code art. 1480 (severability of other provisions), La. Civ. Code art. 1481 (termination of fiduciaries who exercise undue influence over donor), and La. Civ. Code art. 1483 (standard of proof in action for undue influence).

62. La. Civ. Code art. 1492 (repealed 1990). "Captation" is the civilian equivalent of the common-law expression "undue influence." See *supra* note 54. 1990 La. Acts No. 147, § 3, repealing this article, was declared unconstitutional in *Succession of Lauga*, 624 So. 2d 1156, 1172 (La. 1993).

63. At common law, undue influence does not refer strictly to testamentary consent, but also to general contractual consent. See *supra* notes 55-58.

64. Katherine S. Spaht et al., *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 La. L. Rev. 409, 471 (1990).

65. In the situations in question, they might well be. See *Baumgarden v. Langles*, 35 La. Ann. 441 (1883). *Baumgarden* was cited with approval in *Nalty v. Nalty*, 222 La. 911, 64 So. 2d 216 (1953). In *Nalty*, Justice Moise quoted from *Baumgarden*: "[A] person may be mentally and physically weakened by disease, without being legally incapacitated to contract, and the law extends its sheltering arms over such persons to the extent of scrutinizing contracts made by them and protecting them from imposition [and] undue influence . . . by persons dealing with them." *Id.* at 921-22, 64 So. 2d at 220.

66. Ironically, a civilian definition of undue influence suggests an analogy to successions law,

In the context of pre-death settlements, a surviving spouse or child might persuade a court to vacate, on the ground of undue influence, an instrument barring an action in wrongful death. The "inherently emotional nature of such settlements"<sup>67</sup> will, presumably, satisfy the susceptibility requirement, while the settlement itself provides the opportunity for the exercise of undue influence. Either decedent or defendant may be the party guilty of undue influence. A court's only remaining inquiry is a highly subjective one: whether the instrument reflects improper influence.

The distinction between traditional duress and undue influence is not as clear as that between circumstantial duress and undue influence. Traditional duress and undue influence require an actor; circumstantial duress, by its nature, does not. Further, while both traditional and circumstantial duress result from fear, undue influence results from improper exercise of a relationship of domination or confidence.<sup>68</sup> Finally, the victim of duress is, of necessity, aware of the restraints on their consent; often, the victim of undue influence is not.<sup>69</sup>

#### IV. CONCLUSION

*Daigle* may be misleading.<sup>70</sup> Despite its reasoning that pre-death settlements ought to be honored absent "an express legislative or constitutional prohibition,"<sup>71</sup> the supreme court's pretermission of the circumstantial duress issue leaves an avenue of attack against prospective wrongful death settlements. This avenue is widened by the court's use of the expression "undue influence" in its holding. Now, perhaps, such releases may be rescinded upon a showing of undue influence, without the more onerous requirements of proving duress.

What remains for defendants who want finality in pending claims? A careful defense counselor would do well to word any settlement or release to preclude litigation on a claim of circumstantial duress or undue influence. Alternatively, parties could move jointly for a stipulated judgment, requesting a

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for which analogy the *Daigle* court roundly criticized the *Schiffman* majority. *Daigle v. Clemco Indus.*, 613 So. 2d 619, 623 (La. 1993).

67. *Daigle v. Clemco Indus.*, 593 So. 2d 1282, 1288 (La. App. 1st Cir. 1991).

68. See Lonnie Chunn, Note, *Duress and Undue Influence—A Comparative Analysis*, 22 *Baylor L. Rev.* 572, 575-78 (1970).

69. *Id.* at 576.

70. See *Brown v. Drillers, Inc.*, 630 So. 2d 741 (La. 1994). The issue in the case was the scope of a pre-death settlement, not its validity. The court, citing *Daigle* for the seemingly incontrovertible proposition that such settlements are valid, held that the parties must clearly anticipate and intend to compromise wrongful death claims for those claims to be settled. *Id.* at 744.

71. See *Meinerz v. Treybig*, 245 So. 2d 557, 559 (La. App. 3d Cir.), writ refused, 258 La. 580, 247 So. 2d 395 (1971). *Meinerz* was cited in *Daigle*. *Daigle v. Clemco Indus.*, 613 So. 2d 619, 624 (La. 1993).

hearing only on duress and undue influence; any further litigation would require the setting aside of a court judgment, rather than a solely private settlement.

More probably, the legislature must act to prevent the potential for multitudinous suits on these instruments. One possibility is the re-enactment of Louisiana Revised Statutes 9:3921.<sup>72</sup> Such a re-enactment must, however, strengthen its provisions to bar suits claiming duress or undue influence after court approval is granted. A swift and certain resolution of these consent issues is in the best interest of the parties involved, the judicial system, and the state.

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72. Prior to 1984, this statute stated, in pertinent part: "Those persons accorded the right . . . to recover the damages which they may sustain through the wrongful death of an injured person may, *with court approval*, enter into a transaction or compromise agreement with respect thereto, prior to the accrual of such right . . ." La. R.S. 9:3921 (emphasis added).

