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Obligations

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During the last year, the courts of Louisiana addressed a wide spectrum of significant issues in the arena of obligations, including contractual interference,[1] quasi contracts,[2] *stipulations pour autrui*,[3] parol evidence,[4] redhibition,[5] enforcement of contracts,[6] exculpatory agreements,[7] oral contracts,[8] compromises,[9] options,[10] conditional obligations,[11] the sale of litigious rights,[12] the *dation en paiement*,[13] damages,[14] noncompetition pacts,[15] error,[16] subroga-

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1. *E.g.*, Durand v. McGaw, 635 So. 2d 409, 411 (La. App. 4th Cir.) ("Plaintiff had no contract or legally protected interest in his employment necessary for a claim for tortious interference with a contract." (citing 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 234 (La. 1989))), *writ denied*, 640 So. 2d 1318 (1994).

2. *E.g.*, Fogleman v. Cajun Bag & Supply Co., 638 So. 2d 706 (La. App. 3d Cir. 1994); Belgard v. Collins, 628 So. 2d 1254 (La. App. 3d Cir. 1993).

3. *E.g.*, Rivnor Properties v. Herbert O'Donnell, Inc., 633 So. 2d 735 (La. App. 5th Cir.), *writ denied*, 643 So. 2d 147 (1994).

4. *E.g.*, Eiche v. East Baton Rouge Parish Sch. Bd., 623 So. 2d 167 (La. App. 1st Cir.), *writ denied*, 627 So. 2d 657 (1993).

5. *E.g.*, Cormier v. Wise, 638 So. 2d 688 (La. App. 3d Cir. 1994); Poche v. Bayliner Marine Corp., 632 So. 2d 1170 (La. App. 5th Cir. 1994); Johns v. American Isuzu Motors, Inc., 622 So. 2d 1208 (La. App. 2d Cir. 1993); Monk v. Scott Truck & Tractor, 619 So. 2d 890 (La. App. 3d Cir. 1993).

6. *E.g.*, Weeks v. T.L. James & Co., 626 So. 2d 420 (La. App. 3d Cir. 1993), *writ denied*, 630 So. 2d 794 (1994).

7. *E.g.*, Rosenblath's, Inc. v. Baker Indus., Inc., 634 So. 2d 969, 974 (La. App. 2d Cir.) ("All exculpatory contracts are not ipso facto null and void; parties are free to make their own contracts except in instances and under conditions inhibited by law, morals, or public policy."), *writ denied*, 640 So. 2d 1348 (1994).

8. *E.g.*, Belgard v. Collins, 628 So. 2d 1254 (La. App. 3d Cir. 1993).

9. *E.g.*, Brown v. Drillers, Inc., 630 So. 2d 741 (La. 1994).

10. *E.g.*, Baro Controls, Inc. v. Prejean, 634 So. 2d 46 (La. App. 1st Cir. 1994); Pelican Publishing Co. v. Wilson, 626 So. 2d 721 (La. App. 5th Cir. 1993).

11. *E.g.*, Belle Pass Terminal, Inc. v. Jolin, Inc., 634 So. 2d 466 (La. App. 1st Cir.), *writ denied*, 638 So. 2d 1094 (1994); Jarrell v. Carter, 632 So. 2d 321 (La. App. 1st Cir. 1993), *writ denied*, 637 So. 2d 467 (1994).

12. *E.g.*, Peoples Homestead Fed. Bank & Trust v. Laing, 637 So. 2d 604 (La. App. 2d Cir. 1994).

13. *E.g.*, Warren v. Bergeron, 636 So. 2d 1013 (La. App. 1st Cir.), *writ denied*, 642 So. 2d 1295 (1994); Coldwell Banker J. Wesley Dowling & Assocs., Inc. v. City Bank & Trust, 634 So. 2d 959 (La. App. 2d Cir. 1994); Albert v. Albert, 625 So. 2d 765 (La. App. 1st Cir. 1993).

14. *E.g.*, Poché v. Bayliner Marine Corp., 632 So. 2d 1170 (La. App. 5th Cir. 1994).

15. *E.g.*, Team Envtl. Servs., Inc. v. Addison, 2 F.3d 124 (5th Cir. 1993).

16. *E.g.*, M.R. Bldg. Corp. v. Bayou Utils., Inc., 637 So. 2d 614 (La. App. 2d Cir. 1994);

tion,[17] remedies,[18] privity,[19] and principles of interpretation.[20] The following discussion highlights a few of the more significant and interesting decisions.

A. *Undisclosed Principals—Whose Contract Is It?*

In *Woodlawn Park Ltd. Partnership v. Doster Construction Co.*,[21] the Supreme Court of Louisiana, in reversing the first circuit court of appeal, held an undisclosed principal enjoys a right of action against the person who contracted with the undisclosed principal's agent. The case arose as a claim by Woodlawn Park Limited Partnership (Woodlawn Park), seeking to enforce rights under a contract executed between Maurin-Ogden, Inc., and Doster Construction Co. (Doster). In response to Doster's exception of no right of action, Woodlawn Park contended that it received its rights as the "undisclosed principal" of Maurin-Ogden, Inc. Nevertheless, both the trial court and the intermediate appellate court sided with Doster.[22]

The supreme court expressly rejected the argument that an agent of an undisclosed principal, in negotiating a contract, is a *prête-nom*, acting on its own behalf rather than for a hidden principal.[23] In reaching this conclusion, the court ignored both Louisiana Civil Code article 2985[24] and the civilian concept that third persons—including "undisclosed" participants—may claim rights only in extraordinary circumstances, like the *stipulation pour autrui*.[25]

Washington v. Montgomery Ward Life Ins. Co., 640 So. 2d 822 (La. App. 2d Cir. 1994).

17. *E.g.*, Martin v. Louisiana Farm Bureau Casualty Ins. Co., 638 So. 2d 1067 (La. 1994).

18. *E.g.*, Grimsley v. Lenox, 643 So. 2d 203 (La. App. 3d Cir. 1994); Ogden v. Ogden, 643 So. 2d 245 (La. App. 3d Cir. 1994); Gordon v. Levet, 643 So. 2d 371 (La. App. 5th Cir. 1994).

19. *E.g.*, Rivnor Properties v. Herbert O'Donnell, Inc., 633 So. 2d 735, 742 (La. App. 5th Cir.) ("[N]o action for breach of a construction contract may lie in the absence of privity of contract between the parties . . . ."), *writ denied*, 643 So. 2d 147 (1994). *See also* Woodlawn Park Ltd. Partnership v. Doster Constr. Co., 623 So. 2d 645 (La. 1993).

20. *E.g.*, Martin Exploration Co. v. Amoco Prod. Co., 637 So. 2d 1202 (La. App. 1st Cir. 1994); Russellville Steel Co. v. A&R Excavating, Inc., 624 So. 2d 11 (La. App. 5th Cir. 1993).

21. 623 So. 2d 645 (La. 1993).

22. *Id.* at 645-46.

23. *Id.* at 648. This theory also formed a part of the first circuit's rationale. Woodlawn Park Ltd. Partnership v. Doster Constr. Co., 602 So. 2d 1029, 1031 (La. App. 1st Cir. 1992). *See* Teachers' Retirement Sys. v. Louisiana State Employees Retirement Sys., 444 So. 2d 193, 196-97 (La. App. 1st Cir. 1983), *rev'd*, 456 So. 2d 594 (1984); Bruce V. Schewe & Kent A. Lambert, *Obligations, Developments in the Law, 1992-1993*, 54 La. L. Rev. 763, 771-72 (1994).

24. "A *mandate, procuration* or *letter of attorney* is an act by which one person gives power to another to transact for him and in his name, one or several affairs."

25. In *Teachers' Retirement Sys.*, the first circuit analyzed circumstances of an undisclosed principal seeking to enforce the terms of a contract made by its agent. It concluded the undisclosed principal was not a third-party beneficiary. *Teachers Retirement Sys.*, 444 So. 2d at 195.

Relying upon rather dusty jurisprudence to support its position,[26] the supreme court apparently invigorated a nearly half-century-old observation that the "Louisiana jurisprudence, through a line of consistent decisions, [has] created a set of rules, analogous to those governing 'simple agency,' to . . . [apply] to a situation not [expressly] provided for in our written law."[27] While a more appropriate analysis would have flowed from the Civil Code, the court's decision resolves its stated concern of "recognizing that agency as a field of commercial law should be uniform throughout the country"[28] and clearly demonstrates "approval of the use of common law agency notions in commercial transactions."[29]

B. Unjust Enrichment—A Subsidiary Claim

Quasi contracts, an alternative source of obligations to ordinary conventions, exist in two distinct categories: the transaction of another's business and the payment of a thing not due.[30] The third circuit recently addressed the *actio de in rem verso*, the latter classification,[31] in *Fogleman v. Cajun Bag & Supply Co.*[32]

Lyle O. Fogleman was a salesman for Cajun Bag & Supply Co. (Cajun), compensated on the basis of "straight commissions."[33] Cajun conditioned Fogleman's continuing employment upon his signing an employment contract that included a noncompetition clause. Fogleman refused, and Cajun discharged him. Thereafter, Fogleman claimed entitlement to commissions arising out of orders he had placed before his severance but had been neither shipped nor invoiced by the time of his dismissal.[34] Conceding he and Cajun had made no agreement about commissions in this context, Fogleman relied upon the equitable doctrine of quantum meruit, transcribed by the third circuit into a claim for unjust enrichment or the *actio de in rem verso*.[35]

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26. Woodlawn Park Ltd. Partnership v. Doster Constr. Co., 623 So. 2d 645, 648 (La. 1993) (citing Carlisle v. Steamer Eudora & Owners, 5 La. Ann. 15 (1850); Ballister v. Hamilton, 3 La. Ann. 401 (1848); Williams v. Winchester, 7 Mart. (n.s.) 22 (La. 1828); Teche Concrete, Inc. v. Moity, 168 So. 2d 347 (La. App. 3d Cir. 1964), *writ denied*, 170 So. 2d 509 (1965)).

27. Fred W. Jones, *Juridical Basis of Principal—Third Party Liability in Louisiana Undisclosed Agency Cases*, 8 La. L. Rev. 409, 415 (1948).

28. *Woodlawn Park Ltd. Partnership*, 623 So. 2d at 647-48.

29. *Id.* at 648.

30. "All acts, from which there results an obligation without any agreement, . . . form quasi contracts. But there are two principal kinds which give rise to them, to-wit: The transaction of another's business, and the payment of a thing not due." La. Civ. Code art. 2294.

31. For a brief discussion of the former category, traditionally referred to as *negotiorum gestio* or *gestio d'affaire d'altui*, see Schewe & Lambert, *supra* note 23, at 766-67.

32. 638 So. 2d 706 (La. App. 3d Cir. 1994).

33. *Id.* at 707.

34. At the trial of the case, Cajun's principal "testified that commissions were earned only when the products were shipped and invoiced, not when the customer placed the order." *Id.*

35. When "a plaintiff seeks to employ a quantum meruit theory as a substantive ground for recovery, we believe the analysis is more properly made under the doctrine of *actio de in rem verso* or unjust enrichment." *Id.* at 709.

Since *Minyard v. Curtis Products, Inc.*,[36] the courts have set forth five prerequisites to a claim for unjust enrichment: (i) an enrichment of the defendant; (ii) an impoverishment of the plaintiff; (iii) a causal relationship between the defendant's enrichment and the plaintiff's impoverishment; (iv) the absence of a justification for the defendant's enrichment or the plaintiff's impoverishment; and (v) the absence of some other legal remedy available to the plaintiff.[37] Focusing first upon the final factor, the court in *Fogleman* declared that "[s]ince there was no contract under which Mr. Fogleman could recover, the requirement that no other remedy at law exists is fulfilled."[38] The court's adumbrated application of this "subsidiarity" requirement, equating the inability to recover under applicable rules of law with the absence of applicable law, merits attention.

Traditionally, the *actio de in rem verso* had its roots either in Articles 21[39] and 1965[40] of the Louisiana Civil Code of 1870—relying on the availability of equity, in the civilian sense, in the absence of express law—or in quasi contract under Louisiana Civil Code articles 2292, 2293, and 2294.[41] The supreme court addressed the source of the *actio de in rem verso* in *Edmonston v. A-Second Mortgage Co.*[42] and focused upon old Articles 21 and 1965.[43] Under this interpretation, consistent with French law, the *actio de in rem verso* is as a subsidiary claim, for the action is purely a creature born out of equity, available merely to remedy the otherwise unaddressed.[44] In contrast, when the legislature has addressed a subject, equity is never an issue.

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36. 251 La. 624, 205 So. 2d 422 (1967).

37. *See, e.g.*, Kirkpatrick v. Young, 456 So. 2d 622, 624 (La. 1984); Creely v. Leasure Living, Inc., 437 So. 2d 816, 821-22 (La. 1983). The court in *Minyard* noted "the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature." *Minyard*, 251 La. at 652, 205 So. 2d at 432.

38. Fogleman v. Cajun Bag & Supply Co., 638 So. 2d 706, 709 (La. App. 3d Cir. 1994). This is a slippery point, however. The evidence at trial showed Cajun paid commissions to its salesmen after shipping and billing; furthermore, Mr. Fogleman had, in the past, received commissions for sales he did not solicit. Accordingly, the gap in the compensation understanding between Cajun and Mr. Fogleman—not addressing one way or another Mr. Fogleman's entitlement to commissions for solicited sales not yet shipped or invoiced—does not necessarily direct the court to state that, because "there was no contract under which Mr. Fogleman could recover, the requirement that no other remedy . . . exists is fulfilled." *Id.* The court should decide at the outset whether the absence of an agreement on this issue suggests Mr. Fogleman should not recover. Only when the court rejects this premise does it appropriately examine Mr. Fogleman's unjust enrichment allegation.

39. La. Civ. Code art. 21 (1870) authorized the courts to decide cases according to equity only "where there is no express law."

40. La. Civ. Code art. 1965 (1870) provided that "no one ought to enrich himself at the expense of another."

41. *See, e.g.*, *Minyard*, 251 La. at 652, 205 So. 2d at 432. *See also* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 120-23 (La. 1974).

42. 289 So. 2d 116 (La. 1974).

43. "This restitutionary remedy is founded upon principles of unjust enrichment embodied in La. Civ. Code arts. 21 and 1965." *Id.* at 120.

44. The *actio de in rem verso* "is used to fill a gap in the law where no express remedy is provided." *Id.* Additionally, the court in *Edmonston* admonished the bench and the bar to consider

The court in *Minyard* attempted to articulate the limited nature of the claim for unjust enrichment when it explained the function of the subsidiarity requirement as "an aspect of the principle that the action must not be allowed to defeat the purpose of a rule of law directed to the matter at issue. It must not, in the language of some writers, 'perpetuate a fraud on the law.'"[45] Regrettably, this cryptic language did not sufficiently discourage persons from pressing dubious unjust enrichment demands, and the courts have left a void in this area that calls for a "judicial message . . . to show clearly the strict limitations"[46] upon the claim of unjust enrichment.

To add another wrinkle, the legislature's revision of Louisiana Civil Code article 1757, as part of the omnibus revamp of the law of obligations in 1984, arguably altered the gap-stop nature of the *actio de in rem verso*. As revised, Article 1757 reads as follows:

> Obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, *unjust enrichment* and other acts or facts.[47]

Considering the language of Article 1757, the legislature probably did not intend any change in the nature of the *actio de in rem verso*. But, given the courts' expansive treatment of the remedy, it is plausible that a court may read into the language of Article 1757 something not intended by the legislature. Fortunately and correctly, to date, this has not occurred.

Against this backdrop, *Fogleman* presents another opportunity to examine *Minyard* and its progeny and to restate the risk to the integrity of the Civil Code and the other legislation in Louisiana. And while reasonable minds may differ about the third circuit's conclusion in *Fogleman*, it is an important decision in that it recognized the unjust enrichment claim as subsidiary in nature and limited to rare instances.

C. On Hand Me Downs—Transfers of Litigious Rights

The law of Louisiana, consistent with its civilian tradition, while generally not forbidding the sale of litigious rights[48] has long discouraged speculation in lawsuits.[49] One method the legislature has employed to discourage dealing in pending claims is embodied in Louisiana Civil Code article 2652:

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carefully the five prerequisites "[t]o deter courts from turning to equity to remedy every unjust displacement of wealth with unregulated discretion." *Id.*

45. *Minyard*, 251 La. at 652, 205 So. 2d at 433.

46. Bruce V. Schewe, *Obligations, Developments in the Law, 1983-1984*, 45 La. L. Rev. 447, 465 (1985).

47. Emphasis added.

48. La. Civ. Code arts. 2447, 2652-2654.

49. *E.g.*, McClung v. Atlas Oil Co., 148 La. 674, 87 So. 515 (1921).

> He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with interest from its date.

As noted by the supreme court in *Smith v. Cook*,[50] one purpose underlying this release mechanism is "[t]o prevent the purchasing of claims from avarice or to injure the debtor."

The Louisiana Second Circuit Court of Appeal recently addressed an interesting scenario involving the issue of the sale of litigious rights in *Peoples Homestead Federal Bank & Trust v. Laing*.[51] People's Homestead Federal Bank & Trust (People's Bank) brought a suit against Fred Laing, seeking to collect a debt evidenced by a promissory note. After People's Bank filed the petition, the Resolution Trust Corporation (RTC), upon a declaration of People's Bank's insolvency, took possession of the note and substituted itself as the plaintiff in the case against Laing. Subsequently, the RTC assigned the note to Dennis Joslin, who amended the petition to substitute himself as the plaintiff. Laing responded by reserving a defense against Joslin under Louisiana Civil Code article 2652. In turn, Joslin moved to strike Laing's reservation. The district court granted Joslin's request.[52]

On review, the second circuit relied on federal jurisprudence[53] providing that federal regulatory agencies may, in general, obtain the rights and assets of insolvent institutions without regard to limitations otherwise applicable to the transfer of those rights under the various laws of the states.[54] The court also relied on a federal district court decision, *FDIC v. Orrill*,[55] to the effect that the Federal Deposit Insurance Corporation (FDIC) is immune from defenses found in state laws on commercial paper/negotiable instruments because the FDIC receives the assets of a failed financial institution without notice of defenses that the makers of negotiable instruments may have against the insolvent lender/holder.[56] Noting the role of these decisions in the scheme of federal bank rehabilitations,[57] the second

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50. 189 La. 632, 641, 180 So. 469, 472 (1937) (quoting Ferdinand MacKeldy, Handbook of the Roman Law § 369, at 294 (1883)).

51. 637 So. 2d 604 (La. App. 2d Cir. 1994).

52. *Id.* at 605.

53. *See, e.g.*, FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); NCNB Tex. Nat'l Bank v. Cowden, 895 F.2d 1488 (5th Cir. 1990).

54. *Laing*, 637 So. 2d at 606.

55. 771 F. Supp. 777 (E.D. La. 1991), *aff'd*, 978 F.2d 711 (5th Cir. 1992).

56. *Laing*, 637 So. 2d at 606.

57. The second circuit substantiated its invocation and extension of *Orrill* as follows:

> [B]ulk transfers and the ability of federal agencies to estimate the value of a thrift's assets, simply by analyzing its books and records, are often essential elements in saving a distressed institution.
>
> Subjecting the RTC or its assignees to the litigious redemption doctrine would wreak havoc with the agency's ability to perform its statutorily mandated function of managing failed thrifts.

Id. (citations omitted).

circuit extended their reach to include individuals acquiring litigious rights *from* assuming federal agencies.[58] In so doing, the court reasoned that under Louisiana Revised Statutes 10:3-203, the transfer of a negotiable instrument includes all of the rights held by the transferor.[59] Accordingly, Laing's defense, grounded in Article 2652, had no more effect against Joslin than it would have had against the RTC.

The second circuit's opinion is confounding and flawed. The decision in *Orrill* was predicated upon *D'Oench, Duhme & Co. v. FDIC*,[60] which barred defenses based upon the *status* of the FDIC, not upon consideration of the relative merits of the laws of the states and the federal statutes and regulations. That was not a concern in *Laing*, notwithstanding suggestions to the contrary by the court. Further, the second circuit's view of *Orrill* was mistaken. The decision in *Orrill*, issued by the United States District Court for the Eastern District of Louisiana and affirmed without opinion by the United States Fifth Circuit Court of Appeals, is questionable inasmuch as Article 2652 is not contrary to any federal law or regulation. Nothing in the federal scheme of failed financial institution rehabilitation or liquidation empowers persons acquiring things from the FDIC or the RTC, particularly as an isolated transaction and not in bulk, to claim all of the shields and immunities that the FDIC or the RTC may assert. Further, Article 2652 does not empower a debtor-defendant to urge a pre-existing defense; it arises out of the transfer of a litigious right. Thus, wholly apart from any availability of defenses against the FDIC or the RTC—initial transferees—nothing in the federal regulatory scheme for rehabilitating financial institutions dictates that the courts should ignore state laws when dealing with persons purchasing commercial paper from the FDIC or the RTC.

While the second circuit identified conflicting policy concerns implicated by the assumption of litigious rights by the RTC, it failed to explain why it displaced the policy choice represented by Article 2652 when neither the RTC nor the FDIC was a party to the litigation. Oddly, the court allowed Joslin to secure greater rights, unassailable by Article 2652, because he purchased a litigious right from the RTC and not from the People's Bank. That is troubling.

D. Receipt of Less than Expected—Two Remedies

Followers of the jurisprudence dealing with the proof necessary to maintain "redhibition" actions, if asked to define what sort of vice would qualify as "redhibitory," likely would say the defect must be grave enough to render the thing sold "absolutely useless, or its use so inconvenient and imperfect, that it must be

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58. *Id.*

59. *Id.* La. R.S. 10:3-203(b) (1993) reads in part: "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course . . . ."

60. 315 U.S. 447, 62 S. Ct. 676 (1942). The Supreme Court, in the words of the second circuit, recognized "a common law rule of estoppel precluding a borrower from asserting against a federal regulatory agency defenses based upon secret or unrecorded side agreements which alter the terms of the facially unqualified obligation." *Laing*, 637 So. 2d at 607 n.1.

supposed that the buyer would not have purchased it, had he known of the vice."[61] In *Dodson v. Walker*,[62] the supreme court reminded the bench and the bar that this generalized definition presents only a part of the story, and it does not extend to claims in *quanti minoris*.[63]

The court confronted the propriety of a jury instruction "asking [the jury] to determine solely if the evidence showed that the . . . [thing sold] contained a defect which rendered it either absolutely useless or its use so inconvenient and imperfect that the buyer would not have purchased it had they known of the vice."[64] Noting that "[u]nder Louisiana Civil Code article 2543, the judge in a redhibition suit 'may decree merely a reduction of the [purchase] price,'"[65] the court declared that the district court erred by excluding the lesser standard of proof attendant to a claim in *quanti minoris*. The decision, preserving the trial court's control over an action in redhibition and its subspecies, *quanti minoris*, is appropriate and serves as a useful reminder of this remedy.

E. If It Barks, It is a Dog—Classification of Contracts

In *Bamma Leasing Co. v. Secretary of Department of Revenue & Taxation*,[66] the fifth circuit addressed the seemingly elusive distinction drawn in the jurisprudence between a lease with an option to purchase and a "disguised conditional sale." *Bamma Leasing Co.* arose in the context of a tax dispute predicated in part upon whether various transactions entered into by a corporation engaged in the lease financing of automobiles should be classified as financed leases or as conditional sales, the latter being exempt from certain disputed lease taxes.[67] In this light, the court listed three categories of lease financing contracts: (i) contracts providing for the lease of vehicles with a right to purchase at the end of the lease period upon the payment of a "substantial" charge; (ii) agreements omitting any mention of an option to buy; and (iii) contracts purporting to stipulate for lease payments on new cars at a value and for a duration sufficient to account for the vehicle's sale price, with an option to the seller at the end of the lease term to purchase the automobile for $1.00. With respect to the third type of arrangement, the court stated as follows:

> The distinction between a valid "lease with option to purchase" and a disguised "conditional sale" is that in the former, there is an option to give additional consideration in order to purchase the leased item at the end of

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61. La. Civ. Code art. 2520.

62. 630 So. 2d 247 (La. 1994).

63. "Whether the defect in the thing sold be such as to render it useless and altogether unsuited to its purpose, or whether it be such as merely to diminish its value, *the buyer may limit his demand to the reduction of the price*." La. Civ. Code art. 2541 (emphasis added).

64. *Dodson*, 630 So. 2d at 247.

65. *Id.* (citing La. Civ. Code art. 2543).

66. No. 93-CA-881, 1994 WL 498664 (La. App. 5th Cir. Sept. 4, 1994).

67. *See* La. R.S. 47:302(B) (1990).

> the contract term, while in the latter, there is an obligation to pay the full price regardless of whether the option is exercised or not.[68]

The court's separation of conditional sales from leases with options to buy has a long history in the jurisprudence. In *Byrd v. Cooper*,[69] the supreme court observed the following:

> [A] so-called contract of lease by which the lessee binds himself at once and irrevocably for a rental equal to the full value of the thing leased, and is to become owner thereof when the so-called rental is paid in full, and without the payment of any further consideration, is nothing else than a conditional sale disguised under the form of a so-called lease; and the effect of such a contract is to vest title in the so-called lessee, *i.e.*, purchaser.

Similarly, in *Pastorek v. Lanier Systems Co.*,[70] the fourth circuit noted that a purported lease arrangement—reciting that upon completion of the lease term the lessee may pay $1.00 and exercise an option to purchase—was not really a lease. Rather, it was a disguised sale and its terms were designed for the seller "to retain title until payment of the purchase price."[71]

Notwithstanding this line of jurisprudence, the court in *Bamma Leasing Co.* ruled all three of the categories of lease transactions *were* leases. The result reached by the court is confusing because seventeen of the forty-five "leases" in dispute were of the $1.00 option charge category and appear to bear no difference in principle from the "leases" identified as sales by the fourth circuit in *Easy T.V. & Appliance Rental of Louisiana, Inc. v. Secretary of Department of Revenue and Taxation*.[72]

While the fifth circuit noted the lack of evidence of whether the majority of the purported lessees in the third category had actually availed themselves of the $1.00 option, this information may not be relevant. There is nothing to suggest the parties intended these contracts to be leases, nor to suggest the lessor wished to reclaim the vehicles at the end of the lease term.[73] It may be that the outcome reflects the court's concern with what it perceived as a "tax dodge"; accordingly, the case's

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68. *Bamma Leasing Co.*, 1994 WL 498664, at *3.

69. 166 La. 402, 404, 117 So. 441, 442 (1928).

70. 249 So. 2d 224 (La. App. 4th Cir. 1971).

71. *Id.* at 227 (citing Grapico Bottling Works v. Liquid Carbonic Co., 163 La. 1057, 113 So. 454 (1927); Graham Glass Co. v. Nu-Grape Bottling Co., 164 La. 1103, 115 So. 285 (1927)). See also Easy T.V. & Appliance Rental of La., Inc. v. Secretary of Dep't of Revenue & Taxation, 556 So. 2d 100 (La. App. 4th Cir.), *writ denied*, 559 So. 2d 1375 (1990), in which the alleged lessor did not intend to have the item returned for re-rental, but sought to transfer its title upon full payment to the purported lessee.

72. *Easy T.V. & Appliance Rental of La., Inc.*, 556 So. 2d at 102.

73. "Interpretation of a contract is the determination of the common intent of the parties." La. Civ. Code art. 2045.

precedential value may be limited. Nevertheless, the court's language is confusing and overreaching.

F. Insurers, Legal Subrogation, and Windfalls?

Fifteen years ago, Professor Johnson noted "a curious dichotomy in Louisiana law on the question of legal subrogation of an insurer to the rights of its insured against a wrongdoer upon payment of the insured's claim."[74] His observation, unfortunately, is still timely. Professor Johnson was commenting upon the fourth circuit's decision in *Courtney v. Harris*,[75] which refused to extend the ambit of legal subrogation to an insurer that had compensated its insured for injuries suffered in a car accident. He criticized the court's refusal to recognize subrogation, as a matter of law, by the insurer to the insured's rights against the tortfeasor, thereby allowing the tortfeasor to escape responsibility. In Professor Johnson's view, the tortfeasor received an unwarranted windfall that would ultimately be "reflected in even higher premiums on these types of insurance."[76] Several years later, in an apparent advancement on this front, the supreme court commendably decided *Aetna Insurance Co. v. Naquin*[77] and concluded the insurer was legally subrogated to the rights of the insured upon payment of the insured's claim. The opinion seemed to resolve that issue.[78]

Unfortunately, the supreme court recently held in *Martin v. Louisiana Farm Bureau Casualty Insurance Co.*[79] that a health and accident insurer, after making medical payments on behalf of its insured, was not legally subrogated to its insured's claims against the tortfeasor.[80] This unhappy result and the broad language in the court's opinion plunges this area of Louisiana law into an unfortunate and unnecessary state of confusion.

Pursuant to Louisiana Civil Code article 1825, subrogation substitutes one person to the rights of another.[81] To appreciate the role of subrogation in the Civil Code,[82] a brief discussion of performance and extinguishment of obligations is

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74. H. Alston Johnson III, *Obligations, The Work of the Louisiana Appellate Courts, 1977-1978*, 39 La. L. Rev. 675, 675 (1979).

75. 355 So. 2d 1039 (La. App. 4th Cir. 1978).

76. Johnson, *supra* note 74, at 684. "Although the insured pays for this coverage, the rate structure ought to reflect the record of success of the insurer in casting this loss back on the wrongdoer when possible . . . ." *Id.*

77. 488 So. 2d 950 (La. 1986). *See* Bruce V. Schewe, *Obligations, Developments in the Law, 1985-1986*, 47 La. L. Rev. 377, 383-87 (1986).

78. Bruce V. Schewe & Robert L. Theriot, *Obligations, Developments in the Law, 1987-1988*, 49 La. L. Rev. 463, 472 (1988).

79. 638 So. 2d 1067 (La. 1994).

80. "A medical insurer contracts to pay stipulated medical expenses, regardless of whether there is a tortfeasor and tort liability." *Id.* at 1069.

81. "Subrogation is the substitution of one person to the rights of another. It may be conventional or legal." La. Civ. Code art. 1825

82. *See* La. Civ. Code arts. 1825-1830.

helpful. Ordinarily, the debtor performs his obligation.[83] In other instances, a third person may perform vis-a-vis the creditor, and the creditor thereafter may not demand performance from his obligor. But the obligor is not necessarily liberated from performing vis-a-vis the performing third person.[84] To illustrate, one who pays a debt for another may enjoy a claim in quasi contract (either as a *gestion d' affairs* or as an unjust enrichment),[85] under the rules of mandate,[86] or under the portion of the Civil Code governing loans.[87] Often, however, since these rights are not as useful as those possessed by the creditor, the Civil Code affords, through subrogation, a mechanism whereby the person paying in the obligor's stead may acquire the rights of the creditor.[88] Certain commentators have painted subrogation as a limited legal fiction whereby an obligation, although extinguished as to the original creditor by performance from one other than the ultimate obligor, subsists in favor of the person rendering the performance, to permit a claim against the obligor.[89] The redactors of the Civil Code, however, rejected this formulation in favor of treating subrogation as a device for the transfer of obligations, instead of as a fictionalized exception to the general rules of extinguishment of obligations.[90] Legal subrogation operates to substitute the person who has performed an obligation of another to the rights of the creditor. In instances when the person rendering a performance (or a transfer) benefitting another was himself bound to perform it or from which he also obtains a benefit, the existence of legal subrogation serves the admirable policy of encouraging that person's performance under conflicting circumstances.[91]

Louisiana Civil Code article 1829 governs legal subrogation. Pursuant to paragraph (3) of that article, legal subrogation takes place by operation of law in favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of payment. On its face, the legislation distinguishes between an obligor bound with others as a principal and one bound

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83. *See* La. Civ. Code art. 1854.

84. *See, e.g.*, 2 Marcel Planiol & George Ripert, Treatise on the Civil Law (Louisiana State Law Institute trans., West 1959) (1939) § 473(2), at 271. *See also* Saul Litvinoff, The Law of Obligations, *in* 5 Louisiana Civil Law Treatise § 11.1-.59, at 268-306 (1992).

85. *See* La. Civ. Code arts. 2295, 2299.

86. *See* La. Civ. Code arts. 2985, 3022, 3025.

87. *See* La. Civ. Code arts. 2910, 2920, 2921.

88. La. Civ. Code art. 1826 & cmts. (a)-(e), *in* Louisiana Civil Code (A.N. Yiannopoulos ed., West 1994).

89. *See, e.g.*, Planiol & Ripert, *supra* note 84, § 477, at 273. *See also* Aubry & Rau, Droit Civil Francais: Obligations § 321, at 187-210, *in* 1 Civil Law Translations (Louisiana State Law Institute trans., 1965).

90. La. Civ. Code art. 1826 & cmts. (a)-(e), *in* Louisiana Civil Code, *supra* note 88. Importantly, at common law subrogation is a purely equitable doctrine vested solely in the discretion of the court rather than, as it is in Louisiana, a matter of statutory law. *See* Author Buckland, A Text-Book of Roman Law from Augustus to Justinian 449, 565 (2d. ed. 1950), *cited in* Litvinoff, *supra* note 84, § 11.5, at 274.

91. *See, e.g.*, Duchamp v. Dantilly, 9 La. Ann. 247 (1854); R.F. Mestayer Lumber Co. v. Cusack, 141 So. 2d 166 (La. App. 4th Cir. 1962).

for others as an accessory. Obvious examples of the former include a solidary debtor and one of several obligors concerning an indivisible debt. The crucial issue seems to be whether the person who rendered the performance, while an obligor, was bound such that the law affords him, upon his satisfaction of the obligation, recourse against the ultimate obligor, as in the instances of quasi contracts or mandate.[92] Subrogation as a matter of law, plainly, does *not* require that the obligations of the various debtors derive from the same source.[93]

Curiously, against this backdrop, both the intermediate appellate court and the supreme court in *Martin* concluded that a health insurer—because its obligation is not conditioned upon the negligence or liability of the third person tortfeasor—is not entitled to claim legal subrogation to the insured's rights against the tortfeasor to recover its payment of medical bills. This is odd because no one can contend both the insurer and the tortfeasor were not bound with one another in favor of the insured for reparation of the injuries sustained by the insured (including medical expenses), albeit one by contract and the other in tort. Indeed,

> [t]he court would have been on firm ground if it had stated that [the insurer] was solidarily liable with [the tortfeasor] ... vis-a-vis the [insured/victim]. Additionally, the court would have been justified in so doing if it had likened [the insurer] to an uninsured/underinsured motorist carrier and, thus, liable in solido with [the tortfeasor] for the claims of the [insured/victim] or [the tortfeasor] or both.[94]

The court in *Martin* conceded that "[a]n insurer bound to repair the damage caused by a tortfeasor is solidarily liable with the tortfeasor because both are obliged to the same thing—repair of the tort damage."[95] The court stated, however, that a medical insurer that contracts to pay stipulated medical expenses, regardless of the presence of a tortfeasor, is not obligated to repair the same injury as is the tortfeasor.[96] The court's point, apparently, is symptomatic of its focusing upon the source of each debtor's obligation instead of concentrating on the obligation owed, as Article 1829(3) provides.[97]

The court's effort to distinguish *Naquin*, by focusing upon the type of damage caused by a tortfeasor for which an insurer responds, is also strained and confusing:

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92. *See, e.g.*, Hart v. Polizzotto, 168 La. 356, 122 So. 64 (1929); Succession of Whitehead, 3 La. Ann. 396 (1848); Hilgenfeld v. Hilgenfeld, 180 So. 2d 236 (La. App. 2d Cir. 1965); Carpenter v. Cox, 186 So. 863 (La. App. 2d Cir. 1938).

93. *See* La. Civ. Code art. 1797.

94. Schewe, *supra* note 77, at 386.

95. Martin v. Louisiana Farm Bureau Casualty Ins. Co., 638 So. 2d 1067, 1069 (La. 1994) (citing Fertitta v. Allstate Ins. Co., 462 So. 2d 159 (La. 1985)).

96. *Id.*

97. *Id.* The court noted: "The medical insurer thus pays its own debt, not that of the tortfeasor, and the two are not obligated to 'the same thing.'" *Id.* (citing *Fertitta*, 462 So. 2d at 164 n.7).

> *Aetna Ins. Co. v. Naquin* allowed the insurer of rental property subrogation recovery against a negligent roofing contractor. In *Naquin*, both the insurer and the negligent roofer were bound for payment of the leaking roof damages. *Naquin* was a property damage exception to the general rule, which should not be extended to health and accident insurance.[98]

Aside from the type of injury—property damages versus medical expenses—there is no rationale for the court's limitation of the *Naquin* decision. Certainly, the court's casual dismissal of *Naquin* as an "exception to the general rule" should, at a minimum, prompt an examination of "the general rule," when *it* is the flawed creature.

Perhaps the most disturbing part of the supreme court's opinion is its invention of a public policy against legal subrogation in this situation: "Legal subrogation would bestow a *windfall* on [the insurer], which did not bargain for that benefit."[99] The court oddly juxtaposed this point against the policy concerns set forth in *Naquin*:

> [L]egal subrogation is the more desirable and legally cohesive rule. First and foremost are the promptness and certainty of recovery guaranteed the victim. The victim will receive from the wrongdoer and his insurer the full amount of his damages. He will also receive this payment quickly from his insurer, especially if the insurer knows it will later be able to recover from the wrongdoer. If the insurer is able to be reimbursed for a loss caused by another's fault, this success will be reflected in lower premiums. Although the insured is paying for this quick and prompt coverage, the premium he pays ought to reflect the record of success of the insurer in casting this loss back on the wrongdoer when possible. *To refuse to give the insurer a right to subrogation is to cast the loss on the insured class, rather than the person by whose fault the loss occurred.* This undoubtedly has the effect of higher premiums on these types of insurance. Neither can the wrongdoer complain that he has not been accorded a reduction in the damages which he has caused. *Society has an interest in requiring the wrongdoer to pay the full amount of damage he has caused if he is able.*[100]

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98. *Id.* (citation omitted).

99. *Id.* at 1070 (emphasis added).

100. Aetna Ins. Co. v. Naquin, 488 So. 2d 950, 954 (La. 1986) (emphasis added). The court's language in *Naquin* tracked the concerns articulated by Professor Johnson:

> Should there be a rule of law (legal subrogation) which would require that a proven wrongdoer eventually bear the loss caused by his wrongdoing, by reimbursing an insurer which may have borne that loss because of a contract with the injured party? Or, on the other hand, should the wrongdoer escape eventual responsibility for any of the loss because he had the good fortune to injure a party who had provided for the loss through a contract of insurance?

Johnson, *supra* note 74, at 679.

The supreme court's decision in *Martin* represents a profound step backwards from *Naquin*. Considering that only Justice Marcus dissented from the court's opinion,[101] perhaps the legislature must intervene. Should the legislature not suppress the result and the rationale in *Martin*, what should be straightforward principals of law and public policy[102] stand to be wholly thwarted by this judicial miscue.[103]

101. Martin v. Louisiana Farm Bureau Casualty Ins. Co., 638 So. 2d 1067, 1070 (La. 1994) (Marcus, J., dissenting).

102. *See, e.g.*, La. R.S. 46:8 (1982); La. R.S. 23:1101 (Supp. 1994); La. R.S. 23:1123 (Supp. 1994); La. R.S. 47:2105 (1990).

103. *Compare* Durham Life Ins. Co. v. Lee, 625 So. 2d 706 (La. App. 1st Cir. 1993), *with* Martin v. Louisiana Farm Bureau Casualty Ins. Co., 628 So. 2d 1213 (La. App. 3d Cir. 1993), *aff'd*, 638 So. 2d 1067 (1994).