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NOTES

Watkins v. Freeway Motors—A Need to Clarify the Principle of Novation*

I. INTRODUCTION

Plaintiff purchased a used car from the defendant used car dealership. The car was defective so the plaintiff brought the car back to the defendant. The parties agreed to exchange the first car with another one. However, the second car was also defective. Plaintiff demanded the return of the first car's purchase price and defendant refused.

Plaintiff brought suit to rescind the sale and the exchange. The trial court rescinded the contracts and ordered the defendant to refund the purchase price of the original car. The Louisiana Second Circuit Court of Appeals affirmed. *Held*: There was a novation of the first sale when the parties executed the exchange of the vehicles. The practical effect of the substitution of contracts is that the original purchase price was payment for the second car, and "the original sale is no longer of any consequence."¹

As defined by the Louisiana Civil Code, novation is the extinguishment of an existing obligation by the substitution of a new one.² Important in this definition is the recognition that novation involves the substitution of obligations, not the substitution of contracts.³

The second circuit did not make this fundamental distinction in *Watkins v. Freeway Motors*.⁴ The second circuit's decision supports the conclusion that novation can include the substitution of contracts rather than being limited to the substitution of obligations.⁵ While the result reached by the second circuit was correct,⁶ the court's misapplication of the principle of novation could lead to unfavorable results if followed in future decisions. The following example illustrates how the court's decision could lead to such results.

Buyer enters a jewelry store with the intention of purchasing an expensive, unique piece of jewelry for a companion. Buyer selects an item and purchases it from seller. Unfortunately, the uniqueness of the piece does not impress the companion who insists that buyer return the item and demand a refund. Upon return to the store, buyer learns that seller only refunds the purchase price if

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1. *Watkins v. Freeway Motors*, 691 So. 2d 854, 857 (La. App. 2d Cir. 1997).
2. La. Civ. Code art. 1879.
3. *Id.*
4. *Watkins*, 691 So. 2d at 857.
5. *Id.*
6. *Id.*

merchandise is defective. Seller offers to exchange buyer's piece of jewelry for another of comparable value. Buyer gladly accepts the offer and the parties exchange the original piece of jewelry for another piece. However, the new piece of jewelry is defective. Buyer returns to the store with the defective piece and demands a return of the original purchase price. Seller refuses to return the purchase price, but offers to provide the original, non-defective piece of jewelry instead. Buyer finds this unacceptable and files a law suit to recover the purchase price of the original piece of jewelry. What result, a return of the purchase price or the original piece of jewelry?

If the second circuit's decision in *Freeway* was applied to the above example, the buyer would get her money back and the seller would have lost the original sale of a unique, but perfectly sound piece of jewelry. This outcome would follow because the court labeled novation the substitution of contracts rather than the substitution of obligations.

Because the decision in *Freeway* entailed several fundamental legal principles including the law of sales, exchange, redhibition, and novation, the analysis of this article will begin with a presentation and application of the relevant civil code provisions.⁷ This article will then analyze the second circuit's decision in light of the applicable civil code provisions and related case law. The objective of this article is not only to address the problems of the *Freeway* decision, but also to provide a clearer understanding and proper application of the concept of novation.

II. *WATKINS V. FREEWAY MOTORS*

Watkins purchased a 1987 Jaguar XJ6 automobile from Freeway, a used car dealership.⁸ Watkins began experiencing engine and brake problems shortly after the purchase.⁹ She brought the Jaguar back to Freeway and the parties agreed to exchange the Jaguar for a 1989 Volvo GL.¹⁰ Unfortunately, the Volvo also had engine problems that manifested immediately after the exchange.¹¹ Watkins brought the Volvo back to Freeway for repairs.¹² After several unsuccessful inquiries into the status of the repairs, Watkins brought a redhibition action seeking rescission of the exchange and sales contracts.¹³ The

7. This article will begin with the civil code because Louisiana Civil Code article 1 provides: "[T]he sources of law are legislation and custom." As legislation, the civil code is a source of law that should be followed when it provides the solution to a given situation. A court should not resort to secondary sources of law if the code provides an answer. See La. Civ. Code art. 4 which states in part: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity."

8. *Watkins*, 691 So. 2d at 855.

9. *Id.*

10. *Id.* at 856.

11. *Id.*

12. *Id.*

13. *Id.*

trial court rendered judgment in favor of Watkins, rescinding both contracts because the cars had redhibitory defects.¹⁴

In affirming the trial court's decision, the second circuit recognized that the parties had entered into a contract of exchange when they traded the Jaguar for the Volvo. Applying the general obligation of warranty to the contract of exchange, the court found that defects in the Volvo entitled Watkins to rescission of the contract of exchange and return of the original purchase price.¹⁵ The court reasoned that when the parties executed the exchange of the Jaguar for the Volvo, there was a novation of the first sale into a contract of exchange.¹⁶ The court found that the practical effect of the substitution of the cars was that the vendee had "paid \$10,094 for the Volvo and the original sale [was] no longer of any consequence."¹⁷

III. GENERAL PROVISIONS OF THE CIVIL CODE

A. *Obligations in General and Conventional Obligations*

Before an aggrieved party can recover for damages caused by another, a legal relationship must exist between the aggrieved party¹⁸ and the party responsible for the alleged damage.¹⁹ According to the Louisiana Civil Code, "[a]n obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee."²⁰ Obligations may arise from contracts and other declarations of the will, as well as directly from the law.²¹

As one source of obligations, "A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished."²² When two parties enter into a synallagmatic contract like a contract of sale or a contract of exchange, "the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other."²³ A synallagmatic contract involving two parties creates at least two obligations, so that each party is both an obligor and an obligee. Each obligation binds the respective parties to render a performance in favor of the other party. The performances that

14. *Id.* at 856.

15. *Id.* at 857.

16. *Id.*

17. *Id.*

18. In this analysis, Watkins would be the aggrieved party and the obligee.

19. Freeway is the obligor because it is responsible for Watkins' damages.

20. La. Civ. Code art. 1756.

21. La. Civ. Code art. 1757 provides: "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."

22. La. Civ. Code art. 1906.

23. La. Civ. Code art. 1908.

extinguish the parties' respective obligations²⁴ "may consist of giving, doing, or not doing something."²⁵

In addition, obligations may be further distinguished as principal or accessory obligations. The theory that the accessory obligation follows the fate of the principal obligation, *accessorium sequitur principale*, is the basis for this general classification of obligations.²⁶ For example, in the contract of suretyship, the extinction of the principal obligation extinguishes the suretyship, the contract of suretyship being the accessory obligation.²⁷ Another example is a vendor's obligation to warrant the thing sold.²⁸ The warranty obligation is merely an obligation imposed on the vendor to ensure that he has transferred ownership of a thing of value, which value is the equivalent of what the vendor received. As such, the obligation of warranty is an accessory to the principal obligation to transfer ownership of the thing. Without a transfer of ownership, the vendor has no obligation to warrant the thing.

B. Contract of Sale

A sale is a contract that creates obligations²⁹ "whereby a person transfers ownership of a thing to another for a price in money."³⁰ The vendor has an obligation to transfer the ownership of a thing and the vendee has an obligation to pay a price in money.³¹ The vendor's obligation to transfer the ownership of the thing is an obligation to give,³² to transfer a real right³³ over a thing. Generally, ownership transfers from the vendor to the vendee when there is agreement on the movable thing and the price is fixed.³⁴ Thus, the vendor's consent that forms the contract of sale and creates an obligation to give simultaneously amounts to the performance of the vendor's obligation to give.³⁵ In addition to the vendor's principal obligation to give, he is also bound to keep

24. La. Civ. Code art. 1854 provides: "Performance by the obligor extinguishes the obligation."

25. La. Civ. Code art. 1756.

26. See Alain A. Levasseur, *Louisiana Law of Obligations in General, A Precis* 219 (1996).

27. La. Civ. Code art. 3059.

28. La. Civ. Code art. 2475.

29. La. Civ. Code art. 1906.

30. La. Civ. Code art. 2439.

31. See La. Civ. Code art. 2439, 2549.

32. See Levasseur, *supra* note 26, at 7.

33. See La. Civ. Code art. 1763 which provides: "A real obligation is a duty correlative and incidental to a real right."

34. La. Civ. Code art. 2456 provides: "Ownership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price is paid." In general, this article applies to movable things. In relation to immovables, a transfer of ownership requires a writing. La. Civ. Code art. 2440. *But see* La. Civ. Code art. 1839 (oral transfer of immovable property).

35. See Levasseur, *supra* note 26, at 7. See also 2 Planiol Civil Law Treatise, English Translation, pt. I, no. 1447, at 814 (Louisiana Law Institute, 1959) ("this obligation [to give] is reputed executed as soon as it is formed. . .").

the thing safe, "to deliver the thing sold[,] and to warrant to the buyer ownership, peaceful possession of, and the absence of hidden defects in that thing."³⁶

Likewise, the vendee has an obligation to "pay the price and to take delivery of the thing."³⁷ Once the vendor delivers the thing and the vendee pays the price, the only obligation created by the contract of sale that remains is the vendor's obligation to warrant the thing sold.

C. Contract of Exchange

Like a contract of sale, an exchange is also a synallagmatic contract. In a contract of exchange, "the parties to the contract give to one another, one thing for another, whatever it be, except money. . . ." ³⁸ Although "each of the parties is individually considered both as vendor and vendee," ³⁹ the parties create only a single contract rather than two separate contracts. ⁴⁰ As vendors, both parties have obligations to give. Because "[a]n exchange takes place by the bare consent of the parties," ⁴¹ the parties' consent that forms the contract of exchange and creates an obligation to give, simultaneously amounts to their performance. ⁴² The obligations that remain after the parties express their consent to exchange are the obligations to deliver and to warrant the things that are the objects of the parties' obligations to give.

D. Novation

While performance extinguishes an obligation, ⁴³ novation also extinguishes an existing obligation by substituting a new obligation. ⁴⁴ The parties' intentions "to extinguish the original obligation must be clear and unequivocal." ⁴⁵ In addition, "novation has no effect when the obligation it purports to extinguish does not exist. . . ." ⁴⁶ Thus, to effect a novation, the parties must meet two fundamental conditions. ⁴⁷ "The first condition required is that of a succession

36. La. Civ. Code art. 2475.

37. La. Civ. Code art. 2549.

38. La. Civ. Code art. 2660.

39. La. Civ. Code art. 2667.

40. The fact that the parties are considered both vendor and vendee in a contract of exchange "does not warrant the resolution that there are two separate contracts." *Womack v. Sternberg*, 172 So. 2d 683, 685 (La. 1965).

41. La. Civ. Code art. 2661.

42. See *Levasseur*, *supra* note 26, at 7.

43. La. Civ. Code art. 1854.

44. La. Civ. Code art. 1879. See also 2 *Planiol Civil Law Treatise*, *supra* note 35, pt. I, no. 399, at 228 ("The modes of extinction of . . . [obligations are]: (1) payment; (2) giving in payment; (3) novation; (4) compensation; (5) confusion; [or] (6) the termination of the term.").

45. La. Civ. Code art. 1880.

46. La. Civ. Code art. 1883.

47. See *Levasseur*, *supra* note 26, at 199.

of obligations and the second is that of the intent to novate (*animus novandi*).⁴⁸

A succession of obligations requires "the extinguishment of an existing obligation by the substitution of a new one."⁴⁹ A succession of obligations does not occur, and thus no novation occurs, if a prior performance has extinguished the obligation to be substituted⁵⁰ or the obligation is absolutely null.⁵¹ If the obligation to be extinguished is valid, the succession of obligations can occur by either objective⁵² or subjective novation.⁵³ Objective novation occurs when "a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation."⁵⁴ Subjective "[n]ovation takes place when a new obligor is substituted for a prior obligor who is discharged by the obligee."⁵⁵ Thus, objective and subjective novation require "[t]he introduction of a new element to differentiate the old obligation from the new obligation. . . . A mere modification of a [non-essential component part of] . . . an obligation does not amount to a change of obligation[s]" and thus does not effect a novation.⁵⁶ Novation requires that an "essential" element of an obligation be substituted.⁵⁷

The second condition required to effect a novation is the intent to novate, the *animus novandi*.⁵⁸ "[T]he specific intent to novate will serve to distinguish a novation from a mere alteration or modification of an existing obligation. . . . The intent to novate must be specific in the sense that the parties must have meant both to extinguish an obligation and to change it into another one."⁵⁹ However, the intent to novate need not be a subjective manifestation. The

48. See Levasseur, *supra* note 26, at 199.

49. La. Civ. Code art. 1879.

50. 2 Planiol Civil Law Treatise, *supra* note 35, pt. 1, no. 533, at 298 ("If the first debt does not exist, there is no basis for the novation because novation is the equivalent to payment; and every novation, just as every payment, presupposes a debt."). See also La. Civ. Code art. 1854.

51. La. Civ. Code art. 1883.

52. See La. Civ. Code art. 1881.

53. See La. Civ. Code art. 1882.

54. La. Civ. Code art. 1881.

55. La. Civ. Code art. 1882.

56. 1 Saul Litvinoff, *Obligations* § 17.7, at 585, in 5 Louisiana Civil Law Treatise (1992).

57. See La. Civ. Code art. 1881 which provides in part: "Mere modification of an obligation, made without intention to extinguish it, does not effect a novation. The execution of a new writing, the issuance or renewal of a negotiable instrument, or the giving of new securities for the performance of an existing obligation are examples of such a modification." See also 2 Planiol Civil Law Treatise, *supra* note 35, pt. 1, no. 529, at 296 ("The second obligation should differ from the first by a new element, sufficient to distinguish one for the other: '*Novatio enim a novo nomen accipit.*' Without this difference, the old obligation would continue to exist without change, and the purported novation would be only its recognition or confirmation.")

58. See La. Civ. Code art. 1880. See also 2 Planiol Civil Law Treatise, *supra* note 35, pt. 1, no. 543, at 302 ("The intention to novate is indispensable, because a new debt can always be created in addition to the old."); Dig. 46.2.2 (Ulpian, Sabinus, book 48) ("[N]ovation will occur only if the intention is that the obligation be novated; if that is not the case, there will be two obligations.")

59. Levasseur, *supra* note 26, at 202.

parties' actions can imply the intent to novate when the unequivocal result of such actions is to substitute a new obligation for an earlier one that is extinguished.⁶⁰ "The intention to novate may be shown by the character of the transaction, and by the facts and circumstances surrounding it, as well as by the terms of the agreement itself."⁶¹

IV. APPLICATION OF CIVIL CODE PROVISIONS TO THE *FREEWAY* DECISION

Both the trial court and the court of appeals recognized that vendee Watkins and vendor Freeway entered into a contract of sale when Watkins purchased the Jaguar from Freeway.⁶² The parties' agreement on the thing and the price gave rise to a binding, synallagmatic contract of sale.⁶³ This contract created reciprocal obligations for both parties.⁶⁴ The vendee had an obligation to pay the price and to take delivery of the car.⁶⁵ The vendor had an obligation to transfer ownership and to deliver the car.⁶⁶ Because ownership of the car transferred upon the parties' consent,⁶⁷ Freeway's consent simultaneously extinguished its obligation to give.⁶⁸ Freeway's making the car available to Watkins also extinguished its obligation to deliver.⁶⁹ Likewise, Watkins' obligations to pay the price and to take delivery were extinguished by her payment and taking possession of the car.⁷⁰ Thus, Freeway's obligation to warrant to Watkins ownership, peaceful possession, and the absence of hidden defects in the car was the only obligation created by the contract of sale that remained.⁷¹

The trial court and the court of appeals also recognized that the parties entered into a contract of exchange when Watkins traded the defective Jaguar for the Volvo.⁷² The parties' consent that gave rise to the contract of exchange also operated as the performance of their obligations to give.⁷³ As stated by the Louisiana Supreme Court in *Ellerson v. Scott*, "[t]here is no state of suspension

60. 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 544, at 302.

61. *Placid Oil Co. v. Taylor*, 325 So. 2d 313, 316 (La. App. 3d Cir. 1975).

62. *Watkins v. Freeway*, 691 So. 2d 854, 856 (La. App. 2d Cir. 1997).

63. *See* La. Civ. Code art. 2439.

64. *See* La. Civ. Code art. 1908.

65. *See* La. Civ. Code art. 2549.

66. *See* La. Civ. Code arts. 2439, 2475.

67. *See* La. Civ. Code art. 2456.

68. *See* *Levasseur*, *supra* note 26, at 7.

69. *See* La. Civ. Code art. 2477, comment (b) which provides: "that delivery is the transferring of the thing sold into the power and possession of the buyer or the making of the thing available to the buyer by the seller."

70. *See* La. Civ. Code art. 2549. Watkins' extinguished her obligation to pay the price assuming Freeway did not extend any credit to Watkins for the purchase price.

71. *See* La. Civ. Code art. 2475.

72. *Watkins v. Freeway*, 691 So. 2d 854, 857 (La. App. 2d Cir. 1997). *See also* La. Civ. Code art. 2660.

73. *See* La. Civ. Code art. 2661.

for ownership of automobiles in a car trade. Ownership changes simultaneously upon agreement of the parties."⁷⁴ Watkins became the owner of the Volvo and Freeway became the owner of the Jaguar through a single conventional agreement and not two separate and successive contracts.⁷⁵

Recognizing that the Volvo had redhibitory defects⁷⁶ and that the sales articles governing redhibition also apply to contracts of exchange,⁷⁷ the second circuit concluded that the contract of exchange should be rescinded because of the defects in the Volvo.⁷⁸ The court held:

When the parties executed the exchange of the Jaguar for the Volvo, there was a novation of the *first sale*. The practical effect of this substitution is that the plaintiff has paid \$10,094 for the Volvo and the original sale is no longer of any consequence.⁷⁹

What did the court mean when it stated that "there was a novation of the first sale" and that "the original sale is no longer of any consequence"?⁸⁰ By stating that "there was a novation of the first sale"⁸¹ when "the parties executed the exchange,"⁸² the court in effect held that the contract of sale was novated by the contract of exchange. This analysis is inconsistent with the concept of novation.

Novation has for its purpose the extinguishment of an existing *obligation* created by a contract and the substitution of a new obligation under the same contract.⁸³ Novation is not the extinguishment of an existing *contract* by the substitution of a new contract. Existing obligations, not existing contracts, are substituted under novation.⁸⁴ However, extinguishing an existing obligation and substituting a new one can have the effect of transforming the contract that created the original obligation into a new or different type of contract. For example, the performance of a vendee's obligation in a sale, which is to pay the price, can be substituted by a new obligation, the performance of which is to

74. Ellerson v. Scott, 320 So. 2d 527, 529 (La. 1975).

75. See Womack v. Sternberg, 172 So. 2d 683, 685 (La. 1965).

76. *Watkins*, 691 So. 2d at 857.

77. *Id.* at 856. See also La. Civ. Code art. 2667 which provides in part: "All the other provisions relative to the contract of sale apply to the contract of exchange."; Landry v. Istre, 510 So. 2d 1310, 1312 (La. App. 3d Cir. 1987) ("[T]he Civil Code articles relative to redhibitory sales are applicable to contracts of exchange."); *Womack*, 172 So. 2d at 685 ("Except in certain instances . . . the rules governing the contract of sale apply to the contract of exchange.").

78. *Watkins*, 691 So. 2d at 857.

79. *Id.* (emphasis added).

80. *Id.*

81. *Id.*

82. *Id.*

83. La. Civ. Code art. 1879.

84. See La. Civ. Code art. 1879. See also Dig. 46.2.1 (Ulpian, Sabinus book 46) which reflects the general premise that obligations and not contracts are novated by stating: "Novation is the transformation and metamorphosis of an earlier debt into another obligation. . . ."

deliver a thing.⁸⁵ In addition to effecting an objective novation, such a substitution of performances has other effects on the parties' legal relationship.⁸⁶

First, the substitution of performances transforms the original sale into a contract of exchange. A contract of exchange occurs when "the parties to the contract give to one another, one thing for another, whatever it be, except money."⁸⁷ In the above example, the vendee gave a thing to his vendor instead of making a payment in money. Where the original agreement was to create a contract of sale, the substitution of the vendee's performance transforms the original agreement into a contract of exchange.

Second, the substitution of performances operates as a *dation en paiement*⁸⁸ "which [can also] be considered as a novation. . . ."⁸⁹ As one of the modes of extinguishing an obligation,⁹⁰ "[e]very giving in payment . . . involves, even without the parties realizing it, an implied novation."⁹¹ The obligee to a giving in payment consents to substitute the obligor's original performance with a new performance having a different object.⁹² This substitution of performances operates as an objective novation.⁹³ However, neither the novation nor the giving in payment occurs upon the consent of the parties. Because "[d]elivery of the thing is essential to the perfection of a giving in payment,"⁹⁴ the delivery

85. See 1 Litvinoff, *supra* note 56, § 17.11, at 586.

86. Objective "[n]ovation takes place when, by agreement of the parties, a new performance is substituted for that previously owed . . ." La. Civ. Code art. 1881. See also 1 Litvinoff, *supra* note 56, § 17.11, at 586.

87. La. Civ. Code art. 2660. The vendee's existing obligation to pay the price in money is extinguished and substituted by an obligation to deliver a thing.

88. "Giving in payment is a *contract* whereby an obligor gives a thing to the obligee, who accepts it in payment of a debt." La. Civ. Code art. 2655 (emphasis added). Both the French text of Article 2655 of the Louisiana Civil Code of 1825 and the English text of Article 2655 of the Louisiana Civil Code of 1870 describe the giving in payment as an "act." This is in contrast to Louisiana Civil Code article 2655, 1993 La. Acts No. 841, § 1 which describes the giving in payment as a "contract." While comment (a) to Louisiana Civil Code article 2655, 1993 La. Acts No. 841, § 1 states that the revision does not change the law, the use of the word "contract" versus "act" may have legal implications. As discussed in *infra* note 95, an act is not always a contract.

89. 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 530, at 297. *But see* 1 Litvinoff, *supra* note 56, § 17.11 and 17.12, at 586-87, in which Professor Litvinoff supports the position that a giving in payment does not effect a novation because the giving in payment does not create a new obligation. This position is premised on the theory that "as a matter of law, a giving in payment is effective only upon delivery of the thing to the obligee, at which moment the obligor puts an end to his obligation without subjecting himself to a new one." *Id.* at 587 (footnote omitted). As discussed *infra* in note 96, the giving in payment does create a new obligation, the obligation of warranty.

90. "The modes of extinction of . . . [obligations are]: (1) payment; (2) giving in payment; (3) novation; (4) compensation; (5) confusion; (6) the termination of the term." 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 399, at 228.

91. 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 523, at 292.

92. See 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 523, at 291.

93. La. Civ. Code art. 1881.

94. La. Civ. Code art. 2656.

is the "act"⁹⁵ that effectuates both the giving in payment and the novation. Delivery of the thing extinguishes the obligor's prior obligation and creates a new obligation to transfer ownership of the thing.⁹⁶ "[S]uch new [obligation] lasts only an instant . . . but the rapidity of the transactions which succeed each other do not change their nature."⁹⁷ The giving in payment also satisfies the requirement that the parties intend to effect a novation.⁹⁸ "The giving in payment presupposes the intention to novate, since, according to its definition, the creditor renounces his old action in exchange for the one that is given him."⁹⁹

While a giving in payment is an example of the transformation of a contract because of a substitution of obligations, such a transformation did not occur in *Freeway*. The parties' performances extinguished their respective obligations created by the contract of sale.¹⁰⁰ As a result, there was no remaining obligation created by the contract of sale that could be novated.¹⁰¹ The second circuit erred in holding that the contract of sale was novated into a contract of exchange. The parties simply entered into two separate contracts, a contract of sale followed by a contract of exchange.¹⁰²

95. As discussed in *supra* note 88, Louisiana Civil Code article 2655, 1993 La. Acts No. 841, § 1 revisions changed the definition of giving in payment from an "act" to a "contract". In contrast, Louisiana Civil Code article 1879, 1984 La. Acts No. 331, § 1 revisions abandoned the definition of novation as a contract as was found in Article 2185 of the Louisiana Civil Code of 1870. Louisiana Civil Code article 1879, 1984 La. Acts No. 331, § 1 altered the concept of novation by not limiting it to contracts. As comment (a) to Louisiana Civil Code article 1879 states, "novation is not in itself a transaction but the legal effect of certain acts," acts which should include a giving in payment. 1984 La. Acts No. 331, § 1 (emphasis added).

While the revisions to Louisiana Civil Code article 1879, 1984 La. Acts No. 331, § 1 accurately reflect the concept of novation by not restricting its application to contracts only, the revisions to Louisiana Civil Code article 2655, 1993 La. Acts No. 841, § 1 take a step in the opposite direction. Whether the legislature intended to restrict a giving in payment to contracts, such a limitation should not be recognized in light of the expansion of novation to juridical acts beyond contracts. Louisiana Civil Code article 2655, 1993 La. Acts No. 841, § 1 should be interpreted according to the original text of Article 2655 of the Louisiana Civil Code of 1870, recognizing a giving in payment as an "act" versus the more restrictive view as a "contract." Such an interpretation would allow a giving in payment to occur as the result of juridical acts. It would also reflect the changes intended in the expansion of the concept of novation as "the legal effect of certain acts." Revision Comment (a) La. Civil Code art. 1879. As a result, the "act" of giving in payment would also operate as a novation.

96. In addition to creating an obligation to transfer ownership, the giving in payment also creates an obligation to warrant the thing given. "[T]he obligation of warranty is not limited to the contract of sale but is found, in principle, in every case where property is transferred for value. . . ." 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 526, at 293.

97. 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 523, at 291.

98. See La. Civil Code art. 1880 (Novation not presumed).

99. 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 543, at 302.

100. La. Civ. Code art. 1854 states: "Performance by the obligor extinguishes the obligation."

101. See La. Civ. Code art. 1883: "Novation has no effect when the obligation it purports to extinguish does not exist. . . ."

102. It should be noted that *Freeway's* obligation to warrant the Jaguar remained prior to the execution of the contract of exchange. While it may be argued that this obligation could have been

The practical effect of the parties entering into two separate contracts becomes apparent when the contract of exchange is rescinded because the Volvo suffered from redhibitory defects.¹⁰³ Rescission of a contract of exchange returns the parties to the positions they occupied before the contract of exchange; Watkins returns the Volvo to Freeway and Freeway returns the Jaguar to Watkins.¹⁰⁴ However, Freeway's original willingness to exchange the Jaguar for the Volvo is evidence that the Jaguar's defects were redhibitory in nature.¹⁰⁵ The court could have rescinded the contract of sale of the Jaguar and returned the original purchase price to Watkins.

Although the second circuit misapplied the concept of novation in reaching its decision, it arguably could have correctly applied the concept under two possible alternatives. One approach would employ the notion of error as to the object of the original sale. The other approach would apply the concept of obligations subject to a suspensive term.

While error as to the object of a contract is generally thought of as grounds for the dissolution of a contract,¹⁰⁶ such an error may also provide an opportunity to apply the concept of novation. For a contract to be binding, it must create an obligation whose object is the cause of the party's obligation.¹⁰⁷ "Parties are free to contract for any object that is lawful, possible, and determined or determinable."¹⁰⁸

In *Freeway*, the cause of Watkins entering into the sale was to purchase a working car, a car that was the object of Freeway's obligation to give. Because of the defects in the Jaguar, it can be argued that such defects made the sale

substituted by an obligation to transfer ownership of the Volvo or an obligation to warrant the Volvo, such a novation would not have occurred.

When the parties executed the contract of exchange, Watkins transferred the ownership of the Jaguar and also the accompanying warranty owed by Freeway. A vendor's obligation to warrant the thing sold is an accessory obligation to the principal obligation to transfer ownership of the thing. The vendor does not owe a warranty without a transfer of ownership. Because Watkins no longer owned the Jaguar, the obligation of warranty owed by Freeway no longer existed. An obligation must exist to be the object of a novation. See La. Civ. Code art. 1879.

103. La. Civ. Code art. 2520 ("The existence of . . . a [redhibitory] defect gives a buyer the right to obtain rescission of the sale.").

104. See, e.g., *Knight v. Davenport*, 71 So. 2d 388, 390 (La. App. 1st Cir. 1954), in which the trial court recognized that the rescission of an exchange of one cow for another should have resulted in a return of the original cow to the plaintiff. However, the court awarded a return of the purchase price of the original cow to the plaintiff because of the remoteness of the defendant still having the exchanged cow.

105. See *Morvant v. Himel Marine, Inc.*, 520 So. 2d 1194, 1197 (La. App. 3d Cir. 1988) (factory representative's agreement to order a replacement boat was an acknowledgment of redhibitory nature of defect).

106. See, e.g., *Stack v. Irwin*, 167 So. 2d 363, 366 (La. 1964) (if defect in thing sold renders it so imperfect that the contract would not have been entered into, the proper remedy is recession of the contract based upon vice of consent.).

107. See La. Civ. Code art. 1967 which states in part: "Cause is the reason why a party obligates himself."

108. La. Civ. Code art. 1971.

rescindable.¹⁰⁹ The object, the Jaguar, could be said not to exist as a working automobile, the cause of Watkins' obligation. As a result, Freeway's obligation becomes without an object and it must return the purchase price.¹¹⁰ However, the parties could agree that Freeway should keep the price, the object of Watkins' obligation, and that Freeway would substitute the object of its original obligation to give, the Jaguar, for a new object, the Volvo. Thus, Freeway's substitution of its performance would effect an objective novation,¹¹¹ transforming the original sale into a new sale with a different object of performance. Unlike the statement made by the second circuit, the first sale in this scenario is truly of no consequence. Because the Volvo suffered from redhibitory defects, a rescission of the sale of the Volvo would allow Watkins to recover the original purchase price.¹¹²

A second approach to analyzing whether a novation occurred in *Freeway* is to examine whether Freeway's obligation to transfer ownership of the Jaguar was subject to suspensive term.¹¹³ If subject to a suspensive term, the performance of Freeway's obligation would have been suspended until a certain event occurred in the future.¹¹⁴ Such a suspension would allow Freeway's performance to be substituted for another object of performance. This substitution of performances would effect an objective novation and also transform the original sale into a sale with a different object of performance. Unlike the second circuit's conclusion, a novation of the sale into an exchange would not have occurred.

Generally, the parties' consent in a contract of sale transfers the ownership of the thing.¹¹⁵ However, if the vendor's obligation to transfer ownership of the thing is subject to a suspensive term, the performance of his obligation is suspended.¹¹⁶ A contract to sell is an example of a vendor's obligation being

109. See La. Civ. Code art. 2524 which provides: "The thing sold must be reasonably fit for its ordinary use. . . . If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations." One of the buyer's rights when the thing is not fit for its ordinary use would include recession of the contract on grounds of error that "concern[s] a cause . . . [which] bears on . . . the thing that is the contractual object or a substantial quality of that thing. . . ." La. Civ. Code art. 1950.

110. See, e.g., *Smith v. Remodeling Servs., Inc.*, 648 So. 2d 995, 998 (La. App. 5th Cir. 1994) ("A contract of sale is incomplete unless there is a meeting of the minds as to the object. . .").

111. La. Civ. Code art. 1881.

112. See La. Civ. Code art. 2520.

113. "A term may be either suspensive or resolutive. It is suspensive when it postpones the exigibility of the performance. . . ." 1 Litvinoff, *supra* note 56, § 6.3, at 115. See also La. Civ. Code art. 1777.

114. La. Civ. Code art. 1778. See also 1 Litvinoff, *supra* note 56, § 6.1, at 113 (a term "is a period of time allowed for the performance of an obligation.").

115. See La. Civ. Code art. 2456 which provides in part: "Ownership is transferred between the parties as soon as there is agreement on the thing and the price is fixed. . . ."

116. See La. Civ. Code art. 1777 which provides: "A term for the performance of an obligation may be express or it may be implied by the nature of the contract. Performance of an obligation not subject to a term is due immediately."

subject to a suspensive term.¹¹⁷ “In a contract to sell, ownership and risk remain with the vendor, since a contract to sell does not effect a transfer of ownership.”¹¹⁸ While a contract to sell does not effect a transfer of ownership, such an agreement does create obligations giving “either party the right to demand specific performance.”¹¹⁹ “It is most important to stress that, although the execution or performance of the obligation is delayed until the term occurs, the obligation itself is born and does exist.”¹²⁰ Since a contract to sell creates existing obligations,¹²¹ such obligations can become the object of a novation.¹²²

If Freeway’s obligation to transfer ownership was subject to a suspensive term, the parties could have agreed¹²³ that Freeway would substitute its original obligation to give, the performance of which was to transfer the Jaguar’s ownership, for a new obligation, the performance of which was to transfer ownership and make delivery of the Volvo. Substituting the object of Freeway’s performance would have effected an objective novation.¹²⁴ In addition, novation of the underlying obligations would transform, not novate, the original sale into a sale with a different object of performance.¹²⁵ The cause of the transformed sale would be the transfer of ownership of the Volvo.

The Louisiana Third Circuit Court of Appeals implicitly addressed the transformation of a sale by substitution of the vendor’s obligation to give in

117. La. Civ. Code art. 2623 which provides in part, “An agreement whereby one party promises to sell and the other promises to buy a thing at a later time, or upon the happening of a condition, or upon performance of some obligation by either party, is a bilateral promise of sale or contract to sell. Such an agreement gives either party the right to demand specific performance.”

118. La. Civ. Code art. 2623 cmt. (c).

119. La. Civ. Code art. 2623.

120. Levasseur, *supra* note 26, at 42. See also 2 Planiol Civil Law Treatise, *supra* note 35, pt. I, no. 351, at 207 (“The suspensive term does not influence the existence of the obligation; it only retards the execution.”); 1 Litvinoff, *supra* note 56, § 6.8, at 121.

121. See La. Civ. Code art. 1883 which states: “Novation has no effect when the obligation it purports to extinguish does not exist or is absolutely null.” When an obligation is subject to a suspensive term, the obligation does exist but its performance is suspended.

122. See *Antoine v. Elder Realty Co.*, 255 So. 2d 625 (La. App. 3d Cir. 1971) as support for the theory that a contract to sell can create obligations that can be the object of a novation. In *Elder Realty Co.*, the parties entered into a contract to sell a parcel of real estate followed by a subsequent contract of sale. The contract to sell created the vendee’s obligation to pay monthly note installments which the court found was substituted for a new indebtedness evidenced by the subsequent contract of sale. The court held “that the parties intended to substitute the new indebtedness for the old one, and that the old debt, evidenced by the 1961 contract to sell, was extinguished. A novation was thus effected.” *Id.* at 628.

123. See La. Civ. Code art. 1880 (novation not presumed).

124. See La. Civ. Code art. 1881 (objective novation).

125. Dig. 46.2.1 (Ulpian, Sabinus book 46) reflects the general premise that obligations, and not contracts are novated by stating: “Novation is the transformation and metamorphosis of an earlier debt into another obligation. . . .”

Morvant v. Himel.¹²⁶ *Himel* involved a situation factually similar to *Freeway*. Ironically, the court in *Freeway* cited *Himel* as authority for the premise that the contract of sale was novated into a contract of exchange.¹²⁷ In *Himel*, the vendee purchased a defective boat from the vendor.¹²⁸ The vendee returned the boat to the vendor and received a replacement boat.¹²⁹ Problems with the replacement boat also occurred.¹³⁰ After the vendor was unsuccessful in providing the vendee with a third boat, the vendee brought a redhibition action to rescind the contract of sale.¹³¹ In finding that the second boat had redhibitory defects, the court of appeals affirmed the trial court's decision to rescind the sale and return the purchase price of the original boat.¹³²

Unlike *Freeway*, the court in *Himel* did not find that the original sale was novated into a contract of exchange. In fact, the court did not find that the parties had entered into a contract of exchange. The court did not view the substitution of the boats as creating a contract of exchange for two reasons. First, the court did not address the application of the code articles on redhibition to a contract of exchange. The court would have had to discuss such an application of the redhibition articles in order to rescind the exchange of the boats on the grounds of redhibitory defects. Second, the court expressly held that "the trial court properly ordered a rescission of the sale and return of the purchase price to plaintiff."¹³³

Like the court in *Freeway*, the court in *Himel* also incorrectly characterized novation as a substitution of contracts and not of obligations. The court held that "[w]hen the parties agreed to the exchange of the [original boat] for the . . . [replacement boat], this operated as a novation of the first sale."¹³⁴ Although the court concluded that a novation of the first sale occurred, it should have stated that the vendor's obligation to give was novated. As a result, the novation would have the additional effect of transforming the original sale into a sale with a different object of performance. The appellate court's affirmation of the trial court's conclusion that "the new obligation contracted [by the parties] was subject to rescission . . ." supports this interpretation.¹³⁵

The court's reference to a "new obligation" also implicitly supports the view that the vendor's original obligation to give may have been subject to a

126. 520 So. 2d 1194 (La. App. 3d Cir. 1988). See also *Knight v. Davenport*, 71 So. 2d 388, 390 (La. App. 1st Cir. 1954), in which the court of appeal held that a transaction in which an exchange of a new cow for one originally sold was "more of a substitution than an exchange." Unfortunately, the court did not address whether a novation of obligations had occurred.

127. *Watkins v. Freeway*, 691 So. 2d 854, 857 (La. App. 2d Cir. 1997).

128. *Morvant v. Himel Marine, Inc.*, 520 So. 2d 1194, 1195 (La. App. 3d Cir. 1988).

129. *Id.*

130. *Id.* at 1196.

131. *Id.*

132. *Morvant*, 520 So. 2d at 1198.

133. *Id.* at 1198 (emphasis added).

134. *Id.* at 1197 (emphasis added).

135. *Id.* (emphasis added).

suspensive term. If subject to a suspensive term, the vendor's obligation to give could be the object of a novation. The parties could substitute the vendor's obligation for a new obligation, the performance of which has a new object.¹³⁶

Assuming that Freeway's obligation to transfer ownership of the Jaguar was subject to a suspensive term, a novation of that obligation would not have occurred unless the parties had the intent to novate (*animus novandi*).¹³⁷ "The determining factor in deciding whether a novation has been effected is the intention of the parties."¹³⁸ Although novation may not be presumed,¹³⁹ it does not have to be expressed in any manner, provided it is clear and unequivocal.¹⁴⁰ "The intention to novate may be shown by the character of the transaction, and by the facts and circumstances surrounding it, as well as by the terms of the agreement itself."¹⁴¹

Did the parties in *Freeway* intend a novation of the vendor's obligation to transfer ownership of the Jaguar? Did the parties intend to extinguish the vendor's obligation to transfer ownership of the Jaguar and create an obligation to transfer ownership and delivery of the Volvo? Both parties appeared to freely consent to the vehicle substitution and actually did substitute the vehicles. Although the parties may not have been subjectively aware that their actions created a novation, the facts and circumstances surrounding the event¹⁴² could suggest that a novation had taken place. This result is so "because everyone must abide by the legal consequences of what he actually and intentionally does."¹⁴³

V. CONCLUSION

Did a novation occur in *Freeway* when the parties exchanged the Jaguar for the Volvo? Probably not. Although the second circuit in *Freeway* characterized the vehicle substitution as a novation of the contract of sale into a contract of exchange, the court's analysis was incorrect in two respects. First, novation is the substitution of obligations, not contracts. Second, the substitution of the vehicles created a valid contract of exchange, separate and distinct from the prior contract of sale.

If a novation did occur in this case, the court would have had to find that there was either an error as to the object of the original sale or Freeway's obligation to transfer ownership of the Jaguar was subject to a suspensive term.

136. See 1 Litvinoff, *supra* note 56, § 17.12, at 586.

137. See La. Civ. Code art. 1880.

138. *Placid Oil Co. v. Taylor*, 325 So. 2d 313, 316 (La. App. 3d Cir. 1975).

139. La. Civ. Code art. 1880.

140. 1 Litvinoff, *supra* note 56, § 17.2, at 581.

141. *Placid Oil Co.*, 325 So. 2d at 316. See also *Scott v. Bank of Coushatta*, 512 So. 2d 356, 360 (La. 1987).

142. *Placid Oil Co.*, 325 So. 2d at 316.

143. *White Co. v. Hammond Stage Lines*, 158 So. 353, 356 (La. 1934).

In either of these alternatives, an objective novation¹⁴⁴ could have occurred. Freeway would have extinguished its obligation to transfer ownership of the Jaguar and substituted it for an obligation to transfer ownership of the Volvo. The facts and circumstances surrounding the exchange would likely support the parties' intentions to effectuate such a novation.¹⁴⁵

Such a novation has the practical effect of transforming (not novating) the original sale into sale with a different object of performance. A rescission of such a transformed sale due to redhibitory defects in the Volvo would return the parties to the positions they occupied before they entered into the sale; Watkins would have the purchase price returned and Freeway would have the Volvo returned. In that situation, Freeway's original transfer of the Jaguar's possession to Watkins is of no consequence.

However, neither the trial court nor the second circuit found an error as to the object of the sale nor that the sale was subject to a suspensive term. As a result, novation of Freeway's obligation to transfer ownership likely did not occur. Watkins' and Freeway's respective performances extinguished the obligations created by the original contract of sale.¹⁴⁶ The substitution of the Jaguar for the Volvo likewise created a contract of exchange.¹⁴⁷ Because the Volvo suffered from redhibitory defects, the court was correct in rescinding the exchange.¹⁴⁸

The court, however, was incorrect in holding that the original sale was novated into an exchange and that "the original sale [was] no longer of any consequence."¹⁴⁹ The court should have recognized that rescinding the contract of exchange would have placed the parties back into the position they occupied before the exchange: Watkins as the Jaguar's owner and Freeway as the Volvo's owner.¹⁵⁰ The court could have then rescinded the contract of sale because the Jaguar also suffered from redhibitory defects. Freeway's willingness to exchange the Jaguar for the Volvo is evidence that the Jaguar's defects were redhibitory in nature.¹⁵¹ Given this analysis, Freeway would still return the purchase price to Watkins. This result is consistent with the result in *Freeway* without compromising the principles underlying the concept of novation.

144. See La. Civ. Code art. 1881.

145. See *Placid Oil Co.*, 325 So. 2d at 316.

146. See La. Civ. Code art. 1854.

147. See La. Civ. Code art. 2660.

148. See La. Civ. Code art. 2520 (warranty against redhibitory defects); La. Civ. Code art. 2667 (applicability of sales articles to contract of exchange).

149. *Watkins v. Freeway*, 691 So. 2d 854, 857 (La. App. 2d Cir. 1997).

150. See, e.g., *Knight v. Davenport*, 71 So. 2d 388, 390 (La. App. 1st Cir. 1954), in which the trial court recognized that the rescission of an exchange of one cow for another should have resulted in a return of the original cow to the plaintiff.

151. See *Morvant v. Himel Marine, Inc.*, 520 So. 2d 1194, 1197 (La. App. 3d Cir. 1988) (factory representative's agreement to order a replacement boat was acknowledgment of redhibitory nature of defect).

Applying the principle of novation and the applicable code articles correctly is not only imperative to preserve sound legal analysis, but also has practical ramifications. Suppose that the Jaguar had not been defective and Watkins returned to Freeway to exchange it for some reason other than to enforce her legal warranty. For instance, an expansion of Watkins' family might create a need for a larger automobile.

Upon an exchange of the vehicles, Freeway would owe Watkins a warranty against redhibitory defects in the Volvo.¹⁵² If the Volvo suffers from redhibitory defects, as it did in the actual case, Watkins could obtain a rescission of the exchange. The rescission would return the parties to the positions they occupied before the exchange, Watkins as the Jaguar's owner and Freeway as the Volvo's owner. It should be pointed out that Freeway would return the Jaguar and not the Jaguar's original purchase price. This of course assumes that the Jaguar was a sound vehicle and did not suffer from redhibitory defects as it did in *Freeway*. Freeway should not have to return the Jaguar's purchase price when the parties had originally entered into a binding sale.

If a court followed the second circuit's decision in *Freeway* in the above situation, the result would be very different. Freeway would return the Jaguar's purchase price rather than the Jaguar itself. Freeway, or any vendor in Freeway's position, would suffer the loss of a sale in which it was not at fault because of the court's failure to recognize that the original sale was not the object of a novation.

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152. Watkins would likewise owe a warranty to Freeway for any redhibitory defects in the Jaguar. However, if the Jaguar was defective when Freeway sold it to Watkins, Watkins would not owe a warranty to Freeway. Freeway would have been aware of the Jaguar's defects at the time of the exchange. See La. Civ. Code art. 2521 which states: "The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things." See also *Banner Chevrolet, Inc. v. Kelt*, 402 So. 2d 747, 750 (La. App. 4th Cir. 1981) ("[A]pparent defects, such as the buyer might have discovered by simple inspection, do not give rise to redhibitory relief.").

