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Larissa Teipner

Repository Citation

Larissa Teipner, *The Damage Carve-Out of the Louisiana Products Liability Act: Are Manufacturers Potentially Liable for Warranty of Fitness?*, 70 La. L. Rev. (2010)

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The Damage Carve-Out of the Louisiana Products Liability Act: Are Manufacturers Potentially Liable for Warranty of Fitness?

INTRODUCTION

Harry the hauler is in the business of hauling sand. Harry tells a manufacturer–seller of dump trucks that he wants to purchase a model that can haul sand in order to perform a contract that Harry has formed with a third party. Harry purchases a dump truck with the assistance of the manufacturer–seller, but in the performance of his sand-hauling contract, the brakes on the dump truck fail causing Harry to crash. He is injured, his hauling equipment is damaged, and he cannot perform his sand-hauling contract. What are Harry’s remedies against the manufacturer of the truck?

The Louisiana Products Liability Act (LPLA or “the Act”) was enacted to give stability and certainty to manufacturers by imposing a standard by which products are to be judged.¹ The Act sets forth “the exclusive theories of liability for manufacturers for damage caused by their products,”² which means that when the elements of the Act are all met, a plaintiff may only pursue a claim against a manufacturer under the four exclusive theories of liability provided by the legislature.³ Yet, there is one exception to this doctrine of exclusivity nestled in the definition of damage as set forth by the Act. Damage under the LPLA allows a plaintiff to pursue claims under “Chapter 9 of Title VII of Book III of the Civil Code” for either economic loss or damage to the product itself.⁴ In 1993, the legislature revised the “Sales” title of the Civil Code, restructuring the warranty articles, and in doing so added article 2524, “Thing fit for ordinary use,” into the chapter carved out by the Act.⁵

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1. John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 LA. L. REV. 565, 626 (1989) [hereinafter Kennedy, *Primer*].

2. LA. REV. STAT. ANN. § 9:2800.52 (2009).

3. *Stroderd v. Yamaha Motor Corp.*, No. 04-3040, 2005 WL 2037419, at *2 (E.D. La. Aug. 4, 2005).

4. LA. REV. STAT. ANN. § 9:2800.53 (2009).

5. The LPLA originally carved out “Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled ‘Of Vices of Things Sold,’” but during the “Sales” title revision the legislature revamped the articles on redhibition, giving the concept its own chapter. The legislature added article 2524 to this newly formed chapter. LA. REV. STAT. ANN. § 9:2800.53 (2009). See George L. Bilbe, *Redhibition and Implied Warranties Under the 1993 Revision of the Louisiana Law of Sales*, 54 LA. L. REV. 125, 125 (1993).

Whether it was intentional or not, the addition of article 2524 to the newly entitled redhibition chapter may have broadened the scope of the damage exception. This Comment explores the question of whether the addition of article 2524 to the Louisiana Civil Code redefines manufacturer liability by expanding the scope of the LPLA's damage provision. Even if article 2524 is interpreted as falling within the damage carve-out, another issue may impede the imposition of liability upon a manufacturer: specifically, whether redhibition subsumes article 2524. This Comment explores the relationship between these warranties and acknowledges that this inquiry will ultimately affect the viability of article 2524 under the LPLA.

Section I of this Comment examines the LPLA and discusses the redhibition carve-out under the damage provision. Section II explores the addition of article 2524 to the redhibition chapter and the differences between article 2524, redhibition, and the LPLA. Section III addresses whether article 2524 is subsumed by the exclusivity provision of the LPLA when the exclusivity language of the Act applies. The Comment begins by examining the plain language of the Act and the legislative history. Then, the Comment focuses on *Stroderd v. Yamaha Motor Company*, which sets forth a rule that is inconsistent with the plain language of the LPLA. Finally, this Comment assesses a second issue raised by the *Stroderd* court, which is the preemption of article 2524 by redhibition when the claims arise out of the same characteristic of the product.

I. THE LOUISIANA PRODUCTS LIABILITY ACT

The LPLA lays out "the exclusive theories of liability for manufacturers for damage caused by their products."⁶ In order to bring a cause of action under the LPLA a plaintiff must prove: (1) the defendant is a manufacturer of the product; (2) the damage occasioned was proximately caused by a characteristic of the product; (3) the damage arose from a reasonably anticipated use of the product; and (4) the characteristic made the product unreasonably dangerous.⁷ A product is only unreasonably dangerous in construction, in composition, in design, due to an inadequate warning, or because it does not conform to an express

6. LA. REV. STAT. ANN. § 9:2800.52 (2009).

7. *Jefferson v. Lead Indus. Ass'n*, 930 F. Supp. 241, 245 (E.D. La. 1996); *Bernard v. Ferrellgas*, 689 So. 2d 554, 558 (La. App. 3d Cir. 1997); *Delery v. Prudential Ins. Co.*, 643 So. 2d 807, 812-13 (La. App. 4th Cir. 1994), *writ denied*, 648 So. 2d 393 (La. 1994).

warranty of the manufacturer about the product, as defined by the Act.⁸ On its face, the LPLA is the exclusive vehicle for a party to bring suit against a manufacturer for damage caused by its product, and in order to have a viable claim under the Act, the product must qualify as unreasonably dangerous in one of the four ways provided.⁹ Under this interpretation, Harry will only have a viable claim against the manufacturer-seller if he can prove that the dump truck was unreasonably dangerous in construction, in composition, in design, due to an inadequate warning, or because it does not conform to an express warranty of the manufacturer.

As a consequence, if Harry's claim does not fall into one of the categories of unreasonably dangerous products set out under the Act, he cannot recover. Various, however, the exclusivity language of the Act can be treated as a preamble, meaning that the LPLA is only triggered if a product meets the unreasonably dangerous requirement.¹⁰ The effect of this would be that in the absence of an unreasonably dangerous product, the LPLA does not govern, and the exclusivity language does not bar a suit against a manufacturer that falls outside the parameters of the Act.¹¹ Under these circumstances, Harry's actions against the manufacturer will only be limited by the exclusivity language of the Act if the manufacturer sold Harry a product that is unreasonably dangerous. If this condition is not met, Harry has access to all the theories of liability that would be unavailable against a non-manufacturing seller. This Comment presupposes that an unreasonably dangerous product is present, and as such the exclusivity language of the LPLA will be triggered so that the greater issue of the effect of the language can be explored. Thus, while the interpretation of the Act's language is very important in determining when the LPLA's

8. LA. REV. STAT. ANN. § 9:2800.54 (2009).

9. *Ashley v. Gen. Motors Corp.*, 666 So. 2d 1320, 1321–22 (La. App. 2d Cir. 1996) (“The Louisiana Products Liability Act establishes the exclusive theories of liability for manufacturers for damage caused by their products. A claimant may not recover from a manufacturer for damages caused by a product on the basis of any theory of recovery not set forth in the Act.”).

10. John Neely Kennedy, *The Dimension of Time in the Louisiana Products Liability Act*, 42 LA. B.J. 15, 16 (1994) [hereinafter Kennedy, *Dimension of Time*] (“These theories of liability are exclusive. They represent the four and only ways a manufacturer can be liable in tort in cases in which the LPLA controls.”).

11. Interview with William Crawford, Dir., La. Law Inst., in Baton Rouge, La. (Oct. 22, 2008). This is the suggested construction of the language by one of the original drafters of the Act, William Crawford. *Id.*

exclusivity language governs,¹² this Comment presupposes that this triggering event has occurred.

Historically, Louisiana's product liability law was not always so narrowly drawn—general tort theories were available against manufacturers for damage caused by their products.¹³ The LPLA was a reaction to a line of Louisiana Supreme Court decisions that “eliminated the requirement of proof of any particular negligence.”¹⁴ In 1971, the Louisiana Supreme Court, in *Weber v. Fidelity and Casualty Insurance Company of New York*, adopted an equivalent to “*Restatement (Second) of Torts* § 402A, the fountainhead of strict product liability nationwide.”¹⁵ However,

12. If Harry's claim for the harm caused by the product does not meet the LPLA requirements, but Harry has a breach of contract or warranty claim against the manufacturer, the latter interpretation would allow this claim to stand. Policy reasons support the interpretation of the Act's provision as imposing the exclusivity bar only when there is an “unreasonably dangerous” product sold by the manufacturer. Specifically, it would be inequitable for sellers who are similarly situated to have varying liabilities. For example, allowing a plaintiff to sue a manufacturer in breach of contract when the product is unfit is logical when we allow a non-manufacturing seller to be held liable in such a case. There is no question that we would allow Harry to recover against the seller if he was not the manufacturer of the product under Louisiana Civil Code article 2524. LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009). To not allow Harry to recover against the manufacturer-seller is to hinge recovery on the status of the seller as manufacturer of the product. This punishes non-manufacturing sellers more stringently, which is counterintuitive since manufacturers have greater control over the design and fitness of the product. This inequity is exacerbated by the fact that both the manufacturing and non-manufacturing seller have knowledge of the buyer's intended use of the product, as in Harry's case. As such, no distinction should be made between non-manufacturing and manufacturing sellers, and, essentially, when a buyer has a claim arising only out of the unfitness of a product it should be viable against the manufacturer of the unfit product.

13. JOHN M. CHURCH, WILLIAM CORBETT, & TOM RICHARD, *TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES* 635 (2007); FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 15.02 (2d ed. 2009).

14. William Crawford, *Faculty Symposium—Torts*, 33 LA. L. REV. 206, 208 (1973). See also *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 526 (5th Cir. 1995).

15. MARAIST & GALLIGAN, *supra* note 13, § 15.02. In *Weber*, the purchaser of cattle dip brought suit against the manufacturer for the loss of seven cattle and injuries to his sons, allegedly resulting from improper proportions of arsenic in the product. *Weber v. Fid. & Cas. Ins. Co.*, 250 So. 2d 754, 755–56 (La. 1971). The court first stated that liability was contingent upon the plaintiff proving that the product was “defective, i.e., unreasonably dangerous to normal use, and that the plaintiffs injuries were caused” by the defect. *Id.* at 755. In this case, the applicable evidence was spoliated prior to the commencement of the trial, so the bulk of the evidence presented by the plaintiff was his sons' testimonies. *Id.* at 756. The plaintiff buried the cattle and the dip immediately following the incident, and by the trial in 1969 a highway was constructed over the burial site.

Weber left unclear when strict liability was triggered and “the proper test for determining whether a product was ‘unreasonably dangerous.’”¹⁶ The Louisiana Supreme Court addressed these issues in *Halphen v. Johns-Manville Sales Corporation*.¹⁷ The court’s opinion assessed the admissibility of state-of-the-art evidence in a strict product liability action, holding that when a product is “unreasonably dangerous per se,” the maker is liable regardless of his ability to know of its danger.¹⁸ Immediately, *Halphen* spurred legislative action aimed at ineffectuating this “unreasonably dangerous per se” analysis before it could ever be employed, resulting in the passage of the LPLA.¹⁹ Generally, the Act instituted the viability of the state-of-the-art defense, created certainty in the standard upon which products are judged, and implemented a prescriptive period of one year.²⁰ Moreover, the Act employed exclusivity language affecting a claimant’s access to theories of liability against the manufacturer of a defective product.²¹ As a consequence, negligence, *Halphen*’s unreasonably dangerous *per se* strict liability, and intentional tort are “casualties” of the LPLA.²² So, for example, the LPLA eliminated Harry’s

Id. The court, however, imposed a presumption of knowledge of the vices in the product upon the manufacturer, adding that when a product is “defective by reason of its hazard to normal use” the plaintiff is alleviated of having to prove a particular negligence by the maker. *Id.* at 755.

16. MARAIST & GALLIGAN, *supra* note 13, § 15.02.

17. *Id.* § 15.03; *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986). *Halphen* concerned a widow’s wrongful death suit against an asbestos manufacturer. *Halphen*, 484 So. 2d at 112.

18. *Halphen*, 484 So. 2d at 118; MARAIST & GALLIGAN, *supra* note 13, § 15.03. The court’s opinion used *Weber* as a foundation for employing pure strict liability and reasoned that manufacturers are in a better position to bear the costs of defective products than injured plaintiffs. *Halphen*, 484 So. 2d at 118–19.

19. MARAIST & GALLIGAN, *supra* note 13, §§ 15.02–15.03; Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of It All*, 49 LA. L. REV. 629, 630 (1989).

20. James M. Garner, *The Louisiana 1988 Products Liability Reform Act: The Changes and Their Effects*, 5 TUL. CIV. L.F. 129, 160–61, 164 (1990).

21. *Ashley v. Gen. Motors Corp.*, 666 So. 2d 1320, 1321–22 (La. App. 2d Cir. 1996).

22. MARAIST & GALLIGAN, *supra* note 13, §§ 15.04–15.05. It is imperative to note that the effect of the Act is subject to the liability based on product damage—not on a manufacturer’s general liability for actions unrelated to its products. Andrew D. Mendez & Justin P. Lemaire, *Louisiana Products Liability Act: Is a Cause of Action Against a Product Manufacturer for Negligent Training Barred by the LPLA?*, 54 LA. B.J. 182, 183–84 (2006) (“Another argument why a negligent training claim would not fall under the LPLA (so as to be beyond the scope of the Act’s ‘exclusive theories’ provision) turns on the second crucial element of an LPLA claim discussed above: an injury attributable

access to a negligence claim against a manufacturer for damage caused by a product. While *Weber* and *Halphen* demonstrate that the LPLA grew out of a legislative reaction to the judicial development of tort principles,²³ the Act's exclusivity language muddies whether some contract-based theories are viable against a manufacturer for damage caused by its product.²⁴

While the LPLA is couched in terms of exclusivity, it preserves to some extent an action under redhibition.²⁵ Redhibition is a

to negligent training may not necessarily result from a defect or dangerous condition of the product."'). There has been much debate concerning the decision by the legislature to streamline manufacturer liability in product cases. MARAIST & GALLIGAN, *supra* note 13, §§ 15.04–15.05; Galligan, *supra* note 19, at 630; Kennedy, *Primer, supra* note 1, at 588–89. One of the drafters champions the exclusivity provision's incorporation of the different theories of liability into the four ways a maker is held liable under the Act. Kennedy, *Primer, supra* note 1, at 588–90 ("Moreover, as will become apparent below, two of the four ways—defective design and inadequate warnings—are predicated on a negligence standard. Another—defective construction or composition—sounds in strict liability. The fourth—breach of express warranty—is rooted both in strict liability and warranty principles. Consequently, negligence is still an integral part of Louisiana products liability law, but it now exists as a component of the LPLA cause of action rather than as an independent theory of liability."'). Critics, on the other hand, bemoan the elimination of negligence as an independent theory of liability as "unusual," "counterintuitive," and a "radical departure from national tort law and from prior Louisiana law." MARAIST & GALLIGAN, *supra* note 13, § 15.05; Galligan, *supra* note 19, at 630.

23. MARAIST & GALLIGAN, *supra* note 13, §§ 15.02–15.03; Galligan, *supra* note 19, at 630. The Comment will assert that the legislature's response was really targeted at the Louisiana Supreme Court's pro-plaintiff approach to tort law but not intended to affect a manufacturer's general contractual liability, with the exception to this rule being express warranty, which was included in the unreasonably dangerous product test under the Act. *See infra* Part III.C.

24. Prior to the Act a plaintiff could bring non-tort-based claims against a manufacturer, namely based on contract-related theories. Redhibition is an example of a contract-related theory that was available against manufacturers prior to the enactment of the LPLA. MARAIST & GALLIGAN, *supra* note 13, § 15.02. *See* PPG Indus. v. Indus. Laminates Corp., 664 F.2d 1332 (5th Cir. 1982); Delta Refrigeration Co. v. Upjohn Co., 432 F. Supp. 124 (W.D. La. 1977); Phillipe v. Browning Arms Co., 395 So. 2d 310, 319 (La. 1981); Fox v. Am. Steel Bldg. Co., 299 So. 2d 364 (La. App. 3d Cir. 1974). However, contract claims against manufacturers were not limited to redhibition, where a claimant could bring an action in warranty of fitness against manufacturers under article 2475. *See* Demars v. Natchitoches Coca-Cola Bottling Co., 353 So. 2d 433, 436–37 (La. App. 3d Cir. 1977); Davis Co. v. Casso, 5 La. App. 565, *2 (La. Ct. App. 1927).

25. *Stroderd v. Yamaha Motor Corp.*, No. 04-3040, 2005 WL 2037419, at *2 (E.D. La. Aug. 4, 2005); Kennedy, *Primer, supra* note 1, at 580.

seller's duty to warrant a product with hidden vices or defects.²⁶ The dump truck's bad brakes in the original hypothetical are an example of a hidden vice in the thing present at the time of sale, giving rise to an action in redhibition against the manufacturer-seller. This exception to the exclusivity mandate is found in the damage provision of the definitions section. As per the Act, the current definition of damage is read to include: "[D]amage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Chapter 9 of Title VII of Book III of the Civil Code, entitled 'Redhibition,' does not allow recovery for such damage or economic loss."²⁷

A plain reading of this provision suggests that the legislature intended to carve out an exception to the exclusivity provision by specifically preserving Chapter 9 of Title VII of Book III of the Civil Code. This provision is interpreted as preserving the article on redhibition specifically.²⁸ Harry, then, can bring both an LPLA claim and a redhibition claim against the manufacturer-seller of the dump truck.

The language of the damage provision also suggests that the recoverability of a buyer under the Act is contingent on the type of damage occasioned.²⁹ Redhibition as a cause of action against a manufacturer is not preserved in its entirety under the LPLA, where a buyer's right of recovery exists only to the extent that it is

26. LA. CIVIL CODE ANN. art. 2520 (1996 & Supp. 2009); MARAIST & GALLIGAN, *supra* note 13, § 15.06. In order to qualify as redhibitory, the vice must cause the product either to be "totally useless" or "so inconvenient" that the buyer would not have purchased it, or at least would have paid a lesser price, had he known of the defect. LA. CIV. CODE ANN. art. 2520 (1996 & Supp. 2009). The Louisiana Civil Code requires that the defect exist at the time of, or within three days of, delivery in order to have a viable claim for redhibition. LA. CIV. CODE ANN. art. 2530 (1996 & Supp. 2009).

27. LA. REV. STAT. ANN. § 9:2800.53 (2009).

28. For example, in *Monk v. Scott Truck & Tractor*, the Louisiana Third Circuit Court of Appeal found that the owner of a crane had a cause of action against the manufacturer of the crane under article 2545 for redhibition and that recovery was not precluded by the LPLA. 619 So. 2d 890, 893 (La. App. 3d Cir. 1993). In *Draten v. Winn Dixie of Louisiana, Inc.*, the court in dicta stated that the LPLA does not subsume a claim for redhibition, where the owner-seller of a defective picnic bench sought to recover damages and attorneys' fees from the manufacturer of the bench. 652 So. 2d 675, 678 (La. App. 1st Cir. 1995).

29. LA. REV. STAT. ANN. § 9:2800.53 (2009). *Contra* Galligan, *supra* note 19, at 646 ("Both Professor Crawford and Mr. Kennedy suggest that the Act governs claims for personal injury, while redhibition governs claims for 'economic' loss, a notion consistent with some American attitudes towards tort and contract, but not mandated by a literal reading of either the redhibition statutes or the Act.").

for either “damage to the product itself” or “economic loss.”³⁰ The rationale behind this language is that it “preserves the consumer’s right to sue the manufacturer in redhibition for recovery of economic loss because, in most cases, economic loss will *not* be ‘damage’ under the LPLA.”³¹ As a result, a plaintiff pursuing a redhibition claim cannot demand damages for personal injury, and, conversely, “economic loss” damages due to a redhibitory vice are not available to a claimant under the Act.³² If Harry brings both a LPLA and redhibition claim, he will recover personal injury damages under the LPLA claim and damages for “economic loss” or “damage to the product itself” under his redhibition claim.

Thus, the LPLA damage provision provides an exception to the exclusivity requirements, allowing a contractual action in redhibition to exist to the extent of “economic loss” caused by a product within the greater delictual framework of liability provided against a manufacturer.³³ However, an issue arises upon closer examination of the damage provision: articles dealing with redhibition are not the only articles included in the plain language

30. LA. REV. STAT. ANN. § 9:2800.53 (2009); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 252 (5th Cir. 2002); *De Atley v. Victoria’s Secret Catalogue*, 876 So. 2d 112, 115 (La. App. 4th Cir. 2004). While the definition of “economic loss” varies, “purely economic loss or damage may be defined generally as the loss of the benefit of the user’s bargain, that is, the loss of the service the product was supposed to render, including loss consequent upon the failure of the product to meet the level of performance expected of it in the consumer’s business.” 63B AM. JUR. 2D *Products Liability* § 1909 (2008) (“Thus, ‘economic loss’ refers to pecuniary damage for inadequate value, the cost of repair and replacement of the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property.”).

31. MARAIST & GALLIGAN, *supra* note 13, § 15.06. A plaintiff can join LPLA and redhibition claims and recover attorneys’ fees for the portion attributable to redhibition. *Id.* See also Kennedy, *Primer, supra* note 1, at 588 (“Breach of implied warranty, or redhibition, is not also included in section 2800.54(B) as a way of proving that a product is unreasonably dangerous, which means that redhibition is no longer available as a theory of liability when a claimant seeks recovery for personal injury.”).

32. MARAIST & GALLIGAN, *supra* note 13, § 15.06. A practical effect of this distinction is that since attorneys’ fees are unavailable under the Act, the joinder of redhibition and LPLA claims will allow recovery for attorneys’ fees only insofar as those fees are related to the recovery of purely economic loss. Kennedy, *Primer, supra* note 1, at 588. The provision’s effects on the limitation of attorneys’ fees to redhibition claims for economic loss has been criticized because it prohibits recovery by an injured buyer against a manufacturer whose product harmed him physically, but it allows that same manufacturer to recover attorneys’ fees against another manufacturer whose product caused losses to the first manufacturer’s economy. Galligan, *supra* note 19, at 647.

33. SAÚL LITVINOFF, OBLIGATIONS § 16.19, in 6 LOUISIANA CIVIL LAW TREATISE 534 (2d ed. 2001).

of the Act. As stated previously, the entirety of “Chapter 9 of Title VII of Book III of the Civil Code, entitled ‘Redhibition’” is carved out in the Act.³⁴ Stated another way, the redhibition chapter of the Civil Code does not solely pertain to redhibition, but also comprises breach of contract articles governed by the rules of conventional obligations.³⁵ This distinction is important because it affects the availability of attorneys’ fees and the prescriptive period for filing a claim.³⁶

II. LOUISIANA CIVIL CODE ARTICLE 2524 WARRANTY OF FITNESS

Louisiana Civil Code article 2524 is an example of a breach of contract claim in the Redhibition Chapter carve-out of the LPLA.³⁷ Article 2524, or warranty of fitness, embodies the concept that the seller warrants that the good is “fit for the particular purpose for which it was bought.”³⁸ The Louisiana Supreme Court first recognized the warranty in *Fee v. Sentell*,³⁹ and in 1993 the legislature added article 2524 to the Civil Code during a full-scale revision of the sales articles.⁴⁰

Article 2524, titled “Thing fit for ordinary use,” reads as follows:

34. LA. REV. STAT. ANN. § 9:2800.53 (2009).

35. See generally LA. CIV. CODE ANN. art. 2520–2548 (1996 & Supp. 2009). See also LA. CIV. CODE ANN. art. 2524 cmt. b (1996); LA. CIV. CODE ANN. art. 2529 cmts. a, f (1996).

36. See *infra* Part II.

37. LA. REV. STAT. ANN. § 9:2800.53 (2009); LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009).

38. The content of current article 2524 first existed (and continues to exist) in the second sentence of article 2475, which states that “the seller also warrants that the thing sold is fit for its intended use.” LA. CIV. CODE ANN. art. 2475 (1996 & Supp. 2009); 1993 La. Acts. No. 841. The current version of article 2475 cross references article 2524 in comment (b), noting that “intended use” can be presumed to mean “ordinary use” in situations absent seller’s knowledge of buyer’s intent. LA. CIV. CODE ANN. art. 2475 cmt. b (1996). Thus, the warranty of fitness principle was firmly established in Louisiana jurisprudence and the Civil Code prior to the enactment of article 2524. 1993 La. Acts. No. 841.

39. 28 So. 279 (La. 1900); 1993 La. Acts. No. 841.

40. J. Peter Kovata, *The Revision of the Louisiana Civil Code Sales Title: In Many Ways a Non-Event*, 40 LOY. L. REV. 139, 139 (1994). See 1993 La. Acts No. 841, which amended and reenacted Title VII, “Of Sale,” of Book III of the Civil Code. The LPLA originally carved out “Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled ‘Of Vices of Things Sold,’” but during the revision the legislature revamped the articles on redhibition, giving the concept its own chapter. The legislature added article 2524 to this newly formed chapter. LA. REV. STAT. ANN. § 9:2800.53 (2009); Bilbe, *supra* note 5, at 125.

The thing sold must be reasonably fit for its ordinary use. When the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in selecting it, the thing sold must be fit for the buyer's intended use or for his particular purpose.

If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations.⁴¹

The first and second sentences of the article are interpreted disjunctively, giving rise to two scenarios under which an article 2524 action may arise. The first scenario is one in which a presumption arises that the buyer intends "to put the thing to its ordinary use," and the product cannot meet this expectation.⁴² Imagine that Harry did not tell the manufacturer-seller of the dump truck why he wanted to purchase the truck. Without working brakes, Harry's truck is unfit for its ordinary use of hauling and transporting material because it cannot be driven and thus falls under the first sentence contemplated in this article. The second sentence involves a situation where the seller, without giving the buyer an express warranty, knows of the buyer's intended purpose, and in some situations aided the buyer in the selection of the thing, but the thing does not conform to the buyer's intent.⁴³ This situation conforms to the original Harry hypothetical, where he expressly articulated to the manufacturer-seller his intent to haul sand. The third sentence applies to both the first and second sentences, conferring contractual remedies upon a plaintiff who purchases an unfit product.⁴⁴

The comments to article 2524 state that it is governed by the general rules of obligations.⁴⁵ This is important because of its effects on the parties. The first effect deals with prescription, which is "the running of time during which rights are created or extinguished."⁴⁶ Redhibition is subject to a prescriptive period of either four years from delivery or one year from discovery of the defect.⁴⁷ Claims under the LPLA are also governed by a

41. LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009).

42. *Id.* cmt. d.

43. *Id.*; Bilbe, *supra* note 5, at 142.

44. Bilbe, *supra* note 5, at 138.

45. LA. CIV. CODE ANN. art. 2524 cmt. b (1996).

46. Vivica Pierre, *What Do Farmers Impliedly Warrant When They Sell Their Livestock: A Comparison of the Uniform Commercial Code, the Louisiana Civil Code, and the Vienna Convention on Contracts for the International Sale of Goods*, 19 S.U. L. REV. 357, 375 (1992).

47. Bilbe, *supra* note 5, at 133.

prescriptive period of one year.⁴⁸ Article 2524, conversely, falls under article 3499's ten-year prescriptive period.⁴⁹ Thus, if Harry is deemed as having viable redhibition, LPLA, and article 2524 breach of contract claims, he will have considerably more time to bring an action under warranty of fitness than for a redhibition or LPLA claim.

The second effect arises with a buyer's remedies. In most cases, when the seller breaches his article 2524 obligation, the buyer may seek damages and dissolution of the sale, a broader remedy than the one provided under redhibition.⁵⁰ Thus, buyers are incentivized to pursue a fitness claim over a claim for redhibition when both exist.⁵¹ However, this incentive does not arise in the case of the manufacturer, who is charged with presumptive knowledge under article 2545.⁵² In situations of actual—or as with manufacturers—presumed bad faith, the legislature allows the recovery of damages and attorneys' fees by the buyer.⁵³ Attorneys' fees are not available for claimants pursuing causes of action for warranty of fitness.⁵⁴ Since the manufacturer-seller of the dump trucks is deemed a bad faith seller, Harry will not necessarily be getting a greater recovery under article 2524 than he would under redhibition since attorneys' fees are available for the latter. Thus, the significance of including article 2524 in the LPLA's exclusivity exception lies in the prescriptive periods available to plaintiffs but not as much in the availability of a superior remedy.

III. DOES THE LPLA SUBSUME ARTICLE 2524?

In order to determine whether the LPLA preempts a breach of contract claim under article 2524, it is necessary to look at several factors. First, it is necessary to begin with the plain language of the statute and apply methods of interpretation to extract the legislative intent. Next, this Comment will examine the legislative history of

48. Kennedy, *Dimension of Time*, *supra* note 10, at 16.

49. *Morris & Dickson Co. v. Jones Bros. Co.*, 691 So. 2d 882, 890 (La. App. 2d Cir. 1997); Bilbe, *supra* note 5, at 144.

50. LA. CIV. CODE ANN. art. 2541 (1996 & Supp. 2009) (rescission of sale only available under certain circumstances); Bilbe, *supra* note 5, at 140–41.

51. Bilbe, *supra* note 5, at 141.

52. *Id.* at 130–31; LA. CIV. CODE ANN. art. 2545 (1996 & Supp. 2009). Another effect of the bad faith presumption imposed upon manufacturers who sell products with redhibitory defects is that they are “in no circumstances entitled to the repair opportunity afforded vendors” who were in good faith. Bilbe, *supra* note 5, at 132–33.

53. LA. CIV. CODE ANN. art. 2520 (1996 & Supp. 2009); Bilbe, *supra* note 5, at 140–41.

54. Bilbe, *supra* note 5, at 141.

both the Act and the addition of article 2524 to the redhibition chapter, which aids the determination of whether the legislature later intended this addition to affect the scope of the Act. Finally, this Comment will address *Stroderd*'s holding that article 2524 is preempted by the LPLA and, alternatively, by redhibition.

A. The Plain Language and an Exegetical Analysis of the Damage Provision

The LPLA provides that “[a] claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory of liability that is not set forth in this Chapter.”⁵⁵ It also states:

“Damage” includes damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Chapter 9 of Title VII of Book III of the Civil Code, entitled “Redhibition,” does not allow recovery for such damage or economic loss.⁵⁶

Thus, the plain language of the Act establishes several things. First, it sets out the exclusive grounds of liability for a manufacturer for damage caused by its products. Second, it provides an exception to the exclusivity of the Act, which includes those actions brought under “Chapter 9 of Title VII of Book III of the Civil Code.” Finally, the plain language limits the type of damage recoverable under the redhibition chapter exception to either “damage to the product itself” or “economic loss arising from a deficiency in or loss of use of the product.”⁵⁷ As to the second conclusion, there are three actions under the redhibition chapter that are potential candidates for the imposition of liability upon a manufacturer: (1) an action under article 2520 for “Warranty against redhibitory defects”; (2) an action under article 2524 for “Thing fit for ordinary use”; and (3) an action under article 2529 for “Thing not of the kind specified in the contract.” The focus of this Comment is on article 2524 because an action in redhibition is already recognized as a viable exception to the exclusivity mandate of the LPLA. Moreover, the Act incorporated a provision imposing liability upon a manufacturer who expressly

55. LA. REV. STAT. ANN. § 9:2800.52 (2009).

56. *Id.* § 9:2800.53.

57. *Id.* Emphasis of the type of recoverable damage is important since any theory of recovery falling under the exception will be limited to economic damages and personal injury damages under any actions arising from the chapter will not be recoverable. MARAIST & GALLIGAN, *supra* note 13, § 15.06; Kennedy, *Primer*, *supra* note 1, at 588.

warrants its products and thus provides a remedy under the Act for a buyer who would be tempted to bring an article 2529 action for breach of express warranty.⁵⁸ Since article 2524 is located in Chapter 9 of Title VII of Book III of the Civil Code, it falls under the exception in the damage provision according to the plain language of the Act. As a consequence, when the LPLA's requisite elements have been met, a plaintiff should be able to sue a manufacturer under article 2524 to recover losses from either "damage to the product itself" or economic loss arising therefrom, thus escaping the general exclusivity provision of the Act.⁵⁹

58. LA. REV. STAT. ANN. § 9:2800.58 (2009) ("Unreasonably dangerous because of nonconformity to express warranty; A product is unreasonably dangerous when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant or another person or entity to use the product and the claimant's damage was proximately caused because the express warranty was untrue."). See discussion *infra* Part III.C.

59. There are two instances where it is prudent to move past the plain language in search of an alternative meaning than the one provided. KENNETH M. MURCHISON & J.-R. TRAHAN, *WESTERN LEGAL TRADITIONS AND SYSTEMS: LOUISIANA IMPACT* 159, 162–63 (rev. ed. 2003). Interpretation may commence if there is a manifest error in redaction or clerical error. *Id.* It may be possible to apply the manifest error exception to the plain language of the LPLA. The legislature may have intended that "Damage" in the Act include "damage . . . only to the extent that article 2520, entitled 'Warranty against redhibitory defects,' does not allow [such] recovery." Cf. LA. REV. STAT. ANN. § 9:2800.53 (2009). When first enacted, the LPLA's "Damage" provision did not refer to "Chapter 9 of Title VII of Book III of the Civil Code" but instead referred to "Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled 'Of the Vices of the Thing Sold,'" which only pertained to redhibition since it was prior to the revision of the "Sales" title and the addition of article 2524. William Crawford, *New Louisiana Products Liability Act Effective September 1, 1988* (Nov. 18, 1988), in *THE NEW PRODUCTS LIABILITY ACT EFFECTIVE SEPTEMBER 1, 1988*, Nov. 18–19, at 4–6 [hereinafter Crawford, *New LPLA*]. See generally "Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled 'Of the Vices of the Thing Sold,'" of the Louisiana Civil Code (1992). As a consequence, when the legislators originally drafted the exception to the LPLA, warranty of fitness did not fall within the scope of the carve-out, and article 2524 did not exist yet, so the language in hindsight may have mistakenly been drafted to be overbroad. See *infra* Part III.B. However, it begs the question of whether it is appropriate to move past the plain language of the Act—to use evidence of potential legislative intent to determine whether we can move beyond the text to determine the legislature's intent.

It is justifiable to move beyond the plain language of legislation, alternatively, when its application leads to a social insufficiency. MURCHISON & TRAHAN, *supra* note 59, at 162–63. In this instance, a manufacturer may argue that allowing the additional breach of contract claim to fall under the "Damage" exception is unjust in that it exposes them to a liability that is greater than originally existed under the Act. Since this does not delve into the intent of the legislature, but deals solely with the effects of subsequent legislative provisions

An exegetical analysis of the text, specifically the application of the interpretation technique of *ab inutilitate*, supports the conclusion that the legislature intended to draft the article to read "Chapter 9 of Title VII of Book III of the Civil Code," incorporating all the articles in the chapter rather than only to include article 2520, entitled "Redhibition."⁶⁰ It is presumed that the legislature uses language economically, and as such interpretations that render words or phrases superfluous or redundant should be avoided.⁶¹ Thus, to read the clause as including only one article within the chapter is incompatible with how legislation is traditionally read. Further, there is a general rule of civilian interpretation commanding that statutes be interpreted strictly because they derogate from the Civil Code.⁶² Applying this rule to the damage provision would dictate that it is inappropriate to read in a narrower provision than is facially apparent. Finally, reading article 2524 *in pari materia* with the LPLA does not detract from the conclusion that article 2524 should be included as a viable cause of action against a manufacturer since nothing in the article provides evidence that it is not intended to be included in the carve-out.⁶³ While the plain language and text of the article seem to support the inclusion of article 2524 in the Act's exception, it may be necessary to move beyond the text and explore the history of the Act and the article to discern the legislature's intent.

B. A Historical and Teleological Analysis: In Search of the Legislative Intent

There are two stages in the legislative history that need to be addressed in attempting to discern whether it was the intent of the legislature to incorporate article 2524 into the exception provided

on the Act, proceeding past the language of the text is appropriate to determine the intent of the legislature.

60. *Ab inutilitate* is a "time-honored 'maxim'" of civilian interpretation, which means "argument from superfluity." MURCHISON & TRAHAN, *supra* note 59, at 168, 171.

61. *Id.* at 171.

62. "Special dispositions derogate from general dispositions (*specialia generalibus derogant*)."
Id. at 168. "Exceptions are strictly interpreted (*exceptio est strictissimae interpretationis*)."
Id. at 169.

63. *In pari materia* is a method of interpretation where "[o]ne may interpret a given statutory provision in light of other statutory provisions that address the same subject matter," and it is translated to mean "argument from context." *Id.* at 172–73. See LA. CIV. CODE ANN. art. 13 (1999 & Supp. 2009).

by the definition of damage. The first stage is the legislative development of the LPLA. The second stage is the revision of the "Sales" articles, specifically the incorporation of article 2524 into the redhibition chapter. In each stage it is necessary to determine whether the legislature intended article 2524 to be preserved by the redhibition chapter exception to the exclusivity language of the LPLA.

At first blush, the circumstances contemporary with the enactment of the LPLA suggest that the original intent of the drafters was not to protect an action for warranty of fitness. The legal climate in which the Act arose involved legislative hostility to the pro-plaintiff approach taken by the courts in recovery against manufacturers.⁶⁴ As a consequence it would be inconsistent to interpret article 2524 as being exempt from the Act's exclusivity provisions since broadening the scope of liability of manufacturers is counter to the trend established by the legislature following *Halphen*.⁶⁵

However, the aim of the drafters was not entirely pro-manufacturer, as evidenced by the coalition of parties who negotiated the Act, including the Louisiana Association of Business and Industry (LABI) and the Louisiana Trial Lawyers Association (LTLA).⁶⁶ LABI, a pro-business organization, wanted to rein in the new liberalism developed under the *Halphen* doctrine, replacing it with a strictly construed statute that would ensure predictability and lead to lower insurance premiums.⁶⁷ Conversely, LTLA, an organization comprised of primarily plaintiff's attorneys, wanted to maintain the gains achieved under *Halphen*, proposing the enactment of the Restatement (Second) of Torts.⁶⁸ As one of the principal drafters suggests, the Act was "intended to strike an equitable balance between the right of a claimant who is injured in a product-related accident to just compensation and the right of the product's manufacturer to be judged fairly," while adding "clarity, precision[,] and certainty" to the field of products liability.⁶⁹ Also undercutting the argument that the drafting of the Act was in a completely pro-manufacturer climate was the failure of an earlier version of the Act requiring that the plaintiff prove noncompliance by the manufacturer with

64. MARAIST & GALLIGAN, *supra* note 13, §§ 15.02–15.03.

65. *Id.*

66. Galligan, *supra* note 19, at 634.

67. *Id.*

68. *Id.* The Restatement (Second) of Torts § 402A is credited with promoting the implementation of strict product liability. MARAIST & GALLIGAN, *supra* note 13, § 15.02.

69. Kennedy, *Primer*, *supra* note 1, at 626.

the state-of-the-art, a heavy burden on a party less equipped to carry it.⁷⁰

An examination of the legislative reaction to *Halphen* further supports the contention that the legislative intent behind the Act includes preserving a warranty of fitness action. *Halphen* dealt with the expansion of tort liability, specifically the application of strict liability and the removal of the state-of-the-art defense.⁷¹ The legislative backlash after *Halphen* was aimed particularly at the Louisiana Supreme Court's pro-plaintiff construction of tort law but was not aimed at a plaintiff's breach of contract remedies.⁷² The United States Eastern District Court in *In re Ford* stated that a plaintiff's claim for fraud is not subsumed by the LPLA since the Act's "preemptive force . . . extends to claims based on tort duties" and thus does not "bar redhibition actions . . . based on warranty theories."⁷³ This decision recognizes that the LPLA was designed to deal with tort liability—claims based on warranty principals are not barred. Moreover, in drafting the LPLA, the legislature reserved the cause of action in redhibition and created two avenues of liability for a manufacturer: one for its tortious conduct and one for its contractual liability.⁷⁴ These avenues are defined by the limitations on a plaintiff's recovery under each avenue, where the LPLA reserves "economic loss" for redhibition and personal injury for the Act.⁷⁵ Furthermore, the Act states that the conduct resulting in liability constitutes "'fault' within the meaning of Civil Code Article 2315," and the cross references in the Civil Code are all to tort-based articles, such as articles 2315 and 2317.⁷⁶ These factors support a finding that the aim of the Act was to curb the tort liability of manufacturers but was not necessarily intended to affect a plaintiff's ability to bring a claim in contract—particularly an article 2524 breach of contract claim. But this conclusion is undermined by two factors: the original comments to the Act and the existence of article 2475 at the time of the LPLA's enactment.

The original comments to the Act seem to obliterate any suggestion that the legislature intended to reserve a warranty of

70. Galligan, *supra* note 19, at 637.

71. *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986).

72. Cf. Kennedy, *Dimension of Time*, *supra* note 10, at 16 ("These theories of liability are exclusive. They represent the four and only ways a manufacturer can be liable in tort in cases in which the LPLA controls.").

73. *In re Ford Motor Co. Vehicle Paint Litig.*, No. MDL 1063, 1996 WL 426548, at *16 n.3 (E.D. La. July 30, 1996).

74. LITVINOFF, *supra* note 33, at 534.

75. LA. REV. STAT. ANN. § 9:2800.53 (2009).

76. *See id.* § 9:2800.52.

fitness claim at the time of the enactment of the LPLA.⁷⁷ One comment stated that “[b]reach of implied warranties, both of merchantability of a product and of its fitness for its intended purpose, are eliminated as separate causes of action, but are within the scope of the cause of action provided by this Chapter.”⁷⁸ Instead, the drafter’s comment contends that the implied warranty causes of action, including warranty of fitness, are preserved in the Act.⁷⁹

Upon closer examination, however, this assertion is not directly supported. To qualify under the Act, the damage must have been caused by an unreasonably dangerous product.⁸⁰ A product can be unreasonably dangerous in four ways: in construction and composition, in design, due to an inadequate warning, or because it does not conform to an express warranty.⁸¹ The only category that is “rooted . . . in . . . warranty principles” is the last category—failure to conform to an express warranty.⁸² The Act defines “[e]xpress warranty” as “a representation, statement of alleged fact or promise about a product or its nature, material, or workmanship that represents, affirms or promises that the product or its nature, material or workmanship possesses specified characteristics or qualities or will meet a specified level of performance.”⁸³ “Implied warranties,” like article 2524, are categorically excluded by their nature because they apply in situations where there was no communication by the vendor to the vendee of the quality of the thing.⁸⁴ Instead, the warranty arises from the average consumer’s expectation or the buyer’s express purpose as communicated to the seller.⁸⁵ Thus, on the one hand, the original comments are evidence that the legislature did not intend to carve out article 2524 when it drafted the LPLA. However, on the other, article 2524 does not fall within the theories of liability provided by the Act, which is the reason the comments claim the warranty is no longer an independent claim for recovery.

A second factor undermining the argument that the legislature drafted the LPLA to address only tort liability of manufacturers is that warranty of fitness as a cause of action existed under article 2475 prior to the legislative addition of article 2524 to the Civil

77. Crawford, *New LPLA*, *supra* note 59, at 1.

78. *Id.*

79. *Id.*

80. LA. REV. STAT. ANN. § 9:2800.54 (2009).

81. *Id.*

82. Kennedy, *Primer*, *supra* note 1, at 588.

83. LA. REV. STAT. ANN. § 9:2800.53 (2009).

84. LA. CIV. CODE ANN. art. 2524 cmt. d (1996).

85. LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009).

Code.⁸⁶ As such, the legislature could have provided specific provisions carving out the article. Instead, the only exception provided was for “Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled ‘Of the Vices of the Thing Sold,’” which did not include article 2475, the Code basis for warranty of fitness at that time.⁸⁷ On the other hand, the drafters of the LPLA did incorporate express warranty into the Act⁸⁸ as one of the ways a product is unreasonably dangerous.⁸⁹ This suggests that the drafters of the LPLA were cognizant of the Act’s potential effect on warranty and liability in contract. Reasoning *a contrario*, it follows that by the inclusion of the express warranty, the absence of the breach of an implied warranty is not intended to be recoverable against a manufacturer.⁹⁰

While the impetus of the Act was principally motivated to overrule pro-plaintiff decisions like *Halphen*, pro-plaintiff attorneys played a role in drafting the LPLA. Thus, construing the interpretation of the damage provision to comport with the plain language of the Act is consistent to some extent with the circumstances contemporary with enactment, even though it will expand manufacturers’ liability by subjecting them to a breach of contract claim under article 2524. Furthermore, while it is unclear whether the original intent of the drafters was to remove the cause of action for warranty of fitness from plaintiffs in suits against manufacturers, evidence suggests that the Act only purposefully preserved redhibition and express warranty.

While the legislative intent concurrent with the enactment of the LPLA does not support the inclusion of article 2524 in the LPLA’s damage exception, a later legislative act may affect whether article 2524 is included in the carve-out. Following the enactment of the LPLA, the sales portion of the Louisiana Civil Code underwent a revision in 1993, which included the addition of

86. LA. CIV. CODE ANN. art. 2475 (1996 & Supp. 2009).

87. William Crawford, *New LPLA*, *supra* note 59, at 3–7. This is the pre-“Sales” revision version of the damage provision. LA. REV. STAT. ANN. § 9:2800.53 (2009).

88. LA. REV. STAT. ANN. § 9:2800.54 (2009). However, it should be noted that the express warranty that is provided in the Act is *sui generis*. The main deviance from the Civil Code warranty is that it can be relied upon by third persons not a party to the sale. Interview with William Crawford, *supra* note 11.

89. LA. REV. STAT. ANN. § 9:2800.58 (2009).

90. *Touro Infirmary v. Sizeler Architects*, 947 So. 2d 740, 745 (La. App. 4th Cir. 2006). *A contrario* is a civilian interpretation technique, namely “argument by contrast.” MURCHISON & TRAHAN, *supra* note 59, at 168, 169 (“Where a statutory provision lays down a rule for *x*, one can infer, at least under some circumstances, that every non-*x* is subject to an opposing rule.”).

article 2524 into the newly formed redhibition chapter.⁹¹ There is little doctrine on why the Louisiana State Law Institute added article 2524 to the redhibition chapter, and the portion of the bill discussing the implemented changes to the “Sales” title does not mention any intent to change the interpretation of the scope of the LPLA.⁹² In fact, the comments state that while the addition is new, the article does not change the law.⁹³ However, the absence of express language suggesting a change in the law is not dispositive since Louisiana Civil Code article 8 provides for implied repeals of part of a law.⁹⁴ The addition of article 2524 into the chapter dealing with redhibition may function as an implied repeal by expanding the exception of the LPLA’s exclusivity mandate.

A similar argument was attempted in *Pipitone v. Biomatrix, Inc.*, but was ultimately unsuccessful.⁹⁵ A plaintiff who contracted a knee infection following the injection of manufactured replacement synovial fluid sued the maker of the synthetic fluid.⁹⁶ The plaintiff argued that the reenactment of the redhibition articles impliedly repealed the portions of the LPLA, which the courts have interpreted as limiting recovery of redhibition under the Act to “economic loss.”⁹⁷ The Fifth Circuit Court of Appeals rejected this argument, citing the strong presumption against implied repeals in Louisiana, stating that the “re-enactment of the redhibition articles did nothing to change the LPLA’s definition of

91. Bilbe, *supra* note 5, at 125.

92. 1993 La. Acts. No. 841. “V. Redhibition” of the bill gives the history of the warranty of fitness at common law and states that the courts in Louisiana have interpreted redhibition as including warranty of fitness, but little substance on the new article is given. *Id.* With regard to the article specifically, the bill references the comment’s articulation of the appropriate remedy under the article as one in contract. *Id.*

93. LA. CIV. CODE ANN. art. 2524 cmt. a (1996). Upon closer examination, it is evident that the article does affect a change in the law in the realm of good faith. Bilbe, *supra* note 5, at 140–44 (“Turning to the revision’s warranty provisions, it is once more noted that the Law Institute disclaims any intention of changing the law through the enactment of a warranty of reasonable fitness for ordinary use. In the case of good faith sellers of defective items, however, a change in the law appears unavoidable Thus, the revision may well afford an alternative more lucrative than an action in redhibition in every instance where items are affected by redhibitory defects.” (citations omitted)).

94. LA. CIV. CODE ANN. art. 8 (1999 & Supp. 2009) (“Laws are repealed, either entirely or partially, by other laws. A repeal may be express or implied. It is express when it is literally declared by a subsequent law. It is implied when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law. The repeal of a repealing law does not revive the first law.”).

95. 288 F.3d 239 (5th Cir. 2002).

96. *Id.* at 241–42.

97. *Id.* at 250. Plaintiffs argued that the implied repeal resurrected redhibition as a full alternative theory of liability against a manufacturer. *Id.* at 251.

‘damage,’” and noting that limiting the remedy for redhibition to “economic loss” harmonizes the two statutes, as required by Louisiana Civil Code article 13.⁹⁸

Pipitone is distinguishable from this analysis. In *Pipitone*, the plaintiff argued that the mere reenactment of the title containing the redhibition articles functioned as an implied repeal.⁹⁹ The plaintiff’s argument for the repeal was based on a general action taken by the legislature during the overhaul of the “Sales” title, and the court stated that the reenactment did not change the Act’s definition of “Damage.”¹⁰⁰ It would be illogical to allow repeal based on mere reenactment when no content change was instituted. The legislature’s treatment of article 2524 is different. Specifically, the legislature took an affirmative and specific step in adding article 2524 to the redhibition chapter. The article was not just a consequence of the structural adjustment, but an injection of new, specific content into the chapter.

Moreover, the addition of article 2524 is further distinguishable from *Pipitone* because it does not cause discord with the plain language of the Act. In *Pipitone*, the court correctly reasoned that limiting recovery to “economic loss” harmonized the LPLA and article 2520¹⁰¹ because the LPLA expressly limits recovery under the redhibition chapter to “economic loss” or “damage to the product itself.”¹⁰² Thus, the court’s interpretation of this statute accords with the plain language of the Act. To construe the language according to the plaintiff’s interpretation in *Pipitone* and allow the reenactment to replace this express limitation language with old redhibition principles would allow expanded recovery, rendering the plain language of the Act derelict and the statutes in disharmony. However, reading article 2524 as included in the Act’s damage provision does not ineffectuate any provision of the LPLA. To the contrary, it reinforces the plain language of the Act, which carves out the entire chapter of which article 2524 is a part.

Finally, in *Pipitone*, the court noted that there is a presumption against implied repeals in Louisiana.¹⁰³ This presumption is “based on the theory that the legislature envisions the whole body of law when it enacts new legislation,” and as such “a court should give harmonious effect to all acts on a subject when reasonably possible.”¹⁰⁴ *Pipitone*’s analysis supports the incorporation of

98. *Id.* at 251.

99. *Id.* at 250.

100. *Id.* at 251.

101. *Id.*

102. LA. REV. STAT. ANN. § 9:2800.53 (2009).

103. *Pipitone*, 288 F.3d at 251.

104. *State v. Piazza*, 596 So. 2d 817, 819 (La. 1992).

article 2524 into the definition of damage because it endorses the presumption that the legislature was aware of the scope of the existing damage provision when they added the article. Since the construction of article 2524 as a part of the Act's carve-out harmonizes the two statutes, the presumption may be overcome.

It is possible that the addition of article 2524 to the chapter carved out by the LPLA functions as an implied repeal by broadening the scope of the damage provision. An implied repeal requires that the inconsistencies of two legislative acts be so great that they mutually exclude one another.¹⁰⁵ The legislature's addition of article 2524 to the redhibition chapter is an act that is irreconcilable with the original construction of the damage provision as encompassing only redhibition. Even if the addition of article 2524 does not rise to the level of an implied repeal, it does undermine the *a contrario* argument regarding article 2529 on express warranty.¹⁰⁶ While the original incorporation of express warranty into the LPLA indicated a legislative intent to purposely exclude a cause of action for warranty of fitness, the addition of article 2524 during the revision undermines this argument. Now, each warranty is viable against a manufacturer under the plain language of the Act. Thus, whether the legislature intended to make a change in the law by adding article 2524 to the redhibition chapter is unclear. It may be beneficial to interpret the addition of warranty of fitness to the chapter preserved by the LPLA as impliedly repealing the original scope of the exception so as to harmonize the legislative acts and bring accord to the plain language of the Act.

C. *Stroderd v. Yamaha Motor Corporation*

Cases have emerged since the "Sales" title revision that limit the scope of the damage exception to the LPLA's exclusivity language to only the article on redhibition, rather than the entire chapter.¹⁰⁷ The principal case addressing the issue is *Stroderd*, in which the plaintiffs sued a manufacturer of motorcycles under redhibition, article 2524, negligence, and the LPLA due to a recall on the bikes for transmission failure.¹⁰⁸ The United States District Court for the Eastern District of Louisiana granted the

105. *Id.* The test for implied repeal is that it only applies when two legislative acts are "irreconcilable" so that they cannot operate concurrently. *Id.*

106. See *supra* Part III.B.

107. *Stroderd v. Yamaha Motor Corp.*, No. 04-3040, 2005 WL 2037419 (E.D. La. Aug. 4, 2005); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 800 (E.D. La. 1998); *Jefferson v. Lead Indus.*, 930 F. Supp. 241 (E.D. La. 1996).

108. *Stroderd*, 2005 WL 2037419, at *1.

manufacturer's motion to dismiss for two reasons.¹⁰⁹ First, it held that the LPLA and the "Louisiana redhibition law [are] the sole vehicles for suit against a manufacturer for damages arising from a defective product."¹¹⁰ Furthermore, it held that even if the breach of contract claim was not subsumed by the LPLA, it is subsumed by redhibition.¹¹¹

To support the conclusion that the LPLA preempts a cause of action for warranty of fitness, the court cited the plain language and legislative history of the Act.¹¹² In discussing the plain language, the court committed a logical fallacy by manipulating the language of the carve-out so as to support its ultimate conclusion. The court stated that "'Damage' is defined as 'damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that [*a redhibition cause of action*] does not allow recovery for such damage or economic loss.'"¹¹³ Thus, the court bracketed out "Chapter 9 of Title VII of Book III of the Civil Code," which would support the proposition argued by the plaintiff that the warranty of fitness cause of action is an exception to the exclusivity provisions of the Act, and replaced it with the language "[*a redhibition cause of action*]," which supports its own position that the Act's exception only applies to the redhibition article.

The *Stroderd* opinion next cited the legislative history as evidence of the drafters' intent to "make the Act and Louisiana redhibition law the sole vehicles for a suit against a manufacturer for damages arising from a defective product."¹¹⁴ The legislative history does not give a clear or singular legislative intent but instead reveals a coalition of parties asserting various interests.¹¹⁵ Furthermore, *Stroderd* only addressed the legislative history concurrent with the enactment of the LPLA and did not consider the subsequent effects of the "Sales" title revision upon the Act.¹¹⁶

Moreover, the court utilized a series of cases to support its proposition, but each is problematic. For example, the court cited *In re Air Bag Products Liability Litigation*, which also bracketed

109. *Id.* at *2.

110. *Id.* The court based this conclusion on the plain language and legislative history of the Act. *Id.*

111. *Id.* at *3.

112. *Id.* at *2.

113. *Id.* (emphasis added) (citing LA. REV. STAT. ANN. § 9.5800.53 (2009)). Note that the bracketed language is the court's. See also *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 800 (E.D. La. 1998).

114. *Stroderd*, 2005 WL 2037419, at *2.

115. See *supra* Part III.B.

116. *Id.*

out the necessary language, and *Brown v. R.J. Reynolds Tobacco Company*, which did not discuss the issue at hand but instead concerned whether the LPLA is retroactive.¹¹⁷ The opinion also cited *Jefferson v. Lead Industries Association* for the proposition that “plaintiff’s allegations of negligence, fraud by misrepresentation, market share liability, breach of implied warranty of fitness and civil conspiracy fail to state a claim against the lead paint pigment manufacturers under the LPLA and must therefore be dismissed.”¹¹⁸ However, *Jefferson* reached the generalization that breach of implied warranty of fitness is preempted by the Act on the basis of cases dealing with tort theories of liability.¹¹⁹ *Jefferson* also cited the limitation of recovery under redhibition to “economic loss” as support for dismissing the plaintiff’s various claims, which included an implied warranty of fitness claim.¹²⁰ The “economic loss” limitation on redhibition, though, arises out of the language in the definition of damage and is not only subject to redhibition, but rather to the entire chapter.¹²¹ This undercuts the proposition that article 2524 should not be viable since it was added during the 1993 “Sales” title revision and thus falls under the “economic loss” limitation of the LPLA. Thus, *Stroderd*’s first holding that the plain language, legislative history, and case law support the conclusion that the LPLA preempts article 2524 is clearly erroneous. To the contrary, the plain language undermines the court’s assertion, the legislative history is bare, and the case law is easily distinguished.

117. *Stroderd*, 2005 WL 2037419, at *2; *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d at 800 (*In re Air* cited *Vincent v. Timesh*, No. 98-0621, 1998 WL 231036, at *2 (E.D. La. May 7, 1998), which dealt with a motion to dismiss for failure to state a claim where the plaintiff was unable to prove that seller was a manufacturer under the LPLA. The court in *Vincent* did not address the scope of the “damage” or the exclusivity provisions of the LPLA. *Id.*); *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 527 (5th Cir. 1995).

118. 930 F. Supp. 241, 245 (E.D. La. 1996).

119. For example, it references *Automatique New Orleans v. U-Haul Select-It, Inc.*, which deals with negligence, and *Hopkins v. NCR Corporation*, which speaks to strict liability. *Jefferson*, 930 F. Supp. at 245; *Automatique New Orleans v. U-Select-It, Inc.*, No. 94-3179, 1995 WL 491151, at *4 (E.D. La. Aug. 15, 1995); *Hopkins v. NCR Corp., Inc.*, No. 93-188-B-M2, 1994 WL 757510, at *2-3 (M.D. La. Nov. 17, 1994). The legislative history reveals a clear intent to limit the availability of tort remedies against manufacturers since the LPLA was in response to the plaintiff-friendly recoveries allocated by the Louisiana Supreme Court. See *supra* Part I.A. Whether there was a legislative intent to affect contract law is unclear, so extending cases discussing the demise of theories of liability based on tort is not appropriate. See *supra* Part I.A.

120. *Jefferson*, 930 F. Supp. at 245.

121. LA. REV. STAT. ANN. § 9:2800.53 (2009).

The *Stroderd* opinion challenges the plaintiff's breach of warranty action for the independent reason that an article 2524 claim is subsumed by redhibition law.¹²² Determining the relationship between redhibition and warranty of fitness when each is present is critical to this Comment's examination of whether article 2524 is subsumed by redhibition. If a claim for redhibition precludes a claim for warranty of fitness when both are present, then only claims brought under the redhibition article 2520 will stand as an exception to the exclusivity provision of the Act. However, if a breach of contract claim under article 2524 can stand separately from a claim for redhibition, there is a possibility that it too will be swept under the Act's exception.¹²³

While the doctrine of fitness for ordinary use was present in the jurisprudence and in Louisiana Civil Code article 2475 prior to the adoption of article 2524, the warranty's history is riddled with confusion with the warranty of redhibition.¹²⁴ The purpose of the addition of article 2524 to the redhibition chapter was to clarify the difference between the two warranties—and specifically to confirm that warranty of fitness is independent of redhibition.¹²⁵ The Louisiana Supreme Court's analysis in *Hob's Refrigeration and Air Conditioning, Inc. v. Poche* (*Hob's Refrigeration*) not only underscores the difficulty in distinguishing redhibition and warranty of fitness due to the close overlap of subject matter,¹²⁶ but also illustrates that the relationship between the two warranties is unclear when a claim for each is present. In *Hob's Refrigeration*, The installer-seller of an air conditioner sued for payment of services rendered, which included the installation of a compressor

122. *Stroderd*, 2005 WL 2037419, at *3.

123. The effect of this will be to widen liability of manufacturers by allowing plaintiffs to assert an additional breach of contract claim than has traditionally been recognized by the courts since the enactment of the LPLA.

124. LA. CIV. CODE ANN. art. 2524 cmts. a, c (1996) (The legislature notes that while recognized by the courts, the warranty has been confused with redhibition). See 1993 La. Acts. No. 841; Bilbe, *supra* note 5, at 138–41.

125. Bilbe, *supra* note 5, at 139. Article 2524 is not a subset of redhibition, but instead the two concepts are different implied warranties. *Hob's Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326, 327 (La. 1974). The comments to article 2524 make it clear that a violation of the warranty of fitness is a separate cause of action, one under breach of contract, allowing the buyer to seek dissolution or damages or both even though the product is free from redhibitory defects. LA. CIV. CODE ANN. art. 2524 cmt. b (1996); 1993 La. Acts. No. 841, V. Redhibition; *Lundy Enters., L.L.C. v. Shelby Williams Indus.*, No. 01-3291, 2003 WL 282328, at *2 (E.D. La. Feb. 10, 2003) (in dicta); *Cunard Line Ltd. Co. v. Datrex, Inc.*, 926 So. 2d 109, 113–14 (La. App. 3d Cir. 2006); Bilbe, *supra* note 5, at 125.

126. Bilbe, *supra* note 5, at 139–40.

into a unit sold to the defendant-buyer.¹²⁷ The defendant-buyer argued that the compressor was a replacement compressor and that the original was defective.¹²⁸ The Louisiana Fourth Circuit Court of Appeal stated that the defendant should have brought an action for redhibition against the installer-seller, and despite the original defect, the defendant-buyer was liable for the open account.¹²⁹ The Louisiana Supreme Court reversed, citing article 2475's implied warranty of fitness language.¹³⁰ Justice Tate noted that the "compressor did not comply with the implied warranty of fitness for the purpose for which purchased" since the price paid gave rise to a reasonable expectation that the rebuilt unit would last more than three months.¹³¹ This case illustrates an attempt by the Court to recognize warranty of fitness as independently viable, but its rationale is undermined by the fact that the defendant-buyer's claim stemmed from redhibition.¹³²

Later, the legislature's addition of article 2524 to the redhibition chapter confirmed the idea that the two warranties are distinct, as set forth in *Hob's Refrigeration*,¹³³ but the underlying weakness in the court's analysis remains unresolved: knowing that a breach of contract claim under article 2524 is independently cognizable from a claim for redhibition does not shed light on the viability of each when both warranties are present. An example of a situation giving rise to a claim for redhibition and one for article 2524 can be seen by returning to the Harry hypothetical, but an important distinction must be made: specifically, whether the two claims arise out of the same or different characteristics¹³⁴ of the product sold by the manufacturer-seller.¹³⁵

In the original hypothetical, Harry's redhibition, LPLA, and article 2524 claims are all based on the same characteristic of the product, i.e., the brakes. In this situation, the truck is unfit for its ordinary use under article 2524 since it cannot haul sand without brakes, and thus it is not fit for Harry's intended use. It is

127. *Hob's Refrigeration*, 304 So. 2d at 327.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 328.

132. Bilbe, *supra* note 5, at 139-40.

133. It should be noted that the bill for the revision cited *Hob's Refrigeration* when discussing the addition of article 2524. 1993 La. Acts. No. 841; Bilbe, *supra* note 5, at 139-40.

134. This Comment uses the word "characteristic" because "defect" is laden with references to redhibition. Thus, "characteristic" is used to signify the problem in the product that gives rise to any claim available to the claimant-buyer.

135. This Comment presumes that Harry has an "unreasonably dangerous" LPLA claim so that the governing exclusivity language is present.

redhibitorily defective because Harry would not have bought it had he known of the bad brakes. It falls under the LPLA because it was unreasonably dangerous in design during its reasonably anticipated use. In this instance, Harry's article 2524 warranty of fitness claim is tied to the defect that gives rise to the LPLA exclusivity and damage provisions, the situation contemplated throughout this Comment.¹³⁶

On the other hand, imagine a different Harry scenario where he purchases a dump truck from the manufacturer-seller for the express purposes of hauling sand. During the purchase, Harry communicates to the manufacturer that the purchase of the truck is for the specific purpose of hauling sand. Harry then contracts with a third party to haul sand, but during an attempted haul discovers that the truck is not properly sealed for Harry's purposes, and the sand leaks out. Additionally, the brakes on the dump truck fail and cause it to crash, destroying company equipment and injuring poor Harry. In this situation, the truck is unfit under article 2524 due to its inability to haul sand, but there are also separate redhibition and LPLA claims. For example, the redhibition claim is based on the defective brakes in the truck, which caused "economic loss" damage in the form of the loss of Harry's hauling equipment and "damage to the product itself" in the form of the totaled dump truck. An LPLA claim is also available for Harry's personal injury caused by the unreasonably dangerous product, i.e., poor composition or design of the truck's brakes. The presence of the unreasonably dangerous product status triggers the LPLA's exclusivity and damage provisions. This Comment focuses on the first hypothetical because there are obvious and compelling policy reasons to allow Harry to recover for all three claims in the second hypothetical.¹³⁷

136. This situation is analogous to the one presented to the court in *Hob's Refrigeration*, 304 So. 2d 326.

137. It is unfair to allow a manufacturer to escape his liability for breach of contract in the cases where the article 2524 claim arises out of a separate characteristic in the product than the redhibition and LPLA claims. Absent the damage caused by the defective brakes, the plaintiff-buyer would be in the same position as the plaintiff-buyer in the hypothetical discussed in footnote twelve, and all of the same policy reasons to allow him to recover are in place. *A fortiori*, to bar this plaintiff's claim on the grounds that he has independent injuries arising from independent redhibition and LPLA claims would punish him just because he is more injured than the plaintiff in the hypothetical presented in footnote twelve. Instead, it is most equitable in these cases to apply the plain language of the LPLA "Damage" provision only to the theories of liability that arise out of the defect from which the LPLA claim arose, which allows article 2524 to stand outside the umbrella exclusivity and "Damage" provision effects.

Returning to the *Stroderd* discussion, the court based its second conclusion that article 2524 is not viable against a manufacturer because it is subsumed by redhibition¹³⁸ on comment (b) of article 2524, which reads:

Under this article when the thing sold is not fit for its ordinary use, even though it is free from redhibitory defects, the buyer may seek dissolution of the sale and damages, or just damages, under the general rules of conventional obligations. The buyer's action in such a case is one for breach of contract and not the action arising from the warranty against redhibitory defects.¹³⁹

The *Stroderd* court contends that the comment "implies" that warranty of fitness can only be an independent claim when a redhibitory defect is absent, but *Stroderd's* claim is unpersuasive for two reasons.

First, the court cites *PPG Industries v. Industrial Laminates Corporation (PPG)* as supportive of this proposition, but that case is clearly distinguishable.¹⁴⁰ *PPG* is a pre-LPLA and pre-"Sales" revision case dealing with whether an express warranty claim under article 2529 is subsumed by redhibition. Yet, article 2529 on express warranty should be treated differently from warranty of fitness under article 2524. The text of article 2529 states that "when the thing the seller has delivered, *though in itself is free from redhibitory defects*, is not of the kind or quality specified in the contract," the buyer's rights are under conventional obligations.¹⁴¹ The plain language and natural structure of the sentence require that only when the thing is free from redhibitory defects is the buyer's express warranty claim governed by the articles on conventional obligations. This conclusion is further supported by two comments.¹⁴²

To the contrary, article 2524's plain language and comments do not support the conclusion that redhibition trumps when both are present.¹⁴³ There is no language that triggers the rules on conventional obligations in the absence of a redhibitory defect, as is present in article 2529.¹⁴⁴ Instead, the third paragraph confers the

138. *Stroderd v. Yamaha Motor Corp.*, No. 04-3040, 2005 WL 2037419, at *3 (E.D. La. Aug. 4, 2005).

139. LA. CIV. CODE ANN. art. 2524 cmt. b (1996).

140. *Stroderd*, 2005 WL 2037419, at *2 (citing *PPG Indus. vs. Indus. Laminates Corp.*, 664 F.2d 1332, 1335 (5th Cir. 1982)).

141. LA. CIV. CODE ANN. art. 2529 (1996 & Supp. 2009) (emphasis added).

142. *Id.* cmt. b (1996); LA. CIV. CODE ANN. art. 2520 cmt. b (1996).

143. LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009).

144. *Id.*

right to proceed under the rules for conventional obligations upon both fitness for ordinary and particular use and is not subject to any similar inhibitory language.¹⁴⁵ *Stroderd* relies on the language in comment (b) to article 2524 for its proposition,¹⁴⁶ but even this language is unsupportive. Unlike the text in article 2529, the comment to article 2524 states that “[u]nder this article when the thing sold is not fit for its ordinary use, *even* though it is free from redhibitory defects,” the buyer’s remedies are in contract.¹⁴⁷ The use of the word “even,” which is not present in the text of article 2529, connotes that an article 2524 claim is viable in either case, with or without the presence of a redhibitory defect.¹⁴⁸ Read as a whole, the comment’s language marks a distinction between the two warranties and affirms that a warranty of fitness action is viable, even in the absence of a redhibitory claim. Reasoning *a contrario*, since the text of article 2524 is not subject to the inhibitory language of article 2529 on express warranty, one can infer a legislative intent to allow a warranty of fitness claim to withstand the presence or absence of a redhibitory defect.¹⁴⁹

The second reason why *Stroderd*’s reliance on comment (b) does not support the finding that article 2524 is subsumed by redhibition is the timing of the addition of both articles to the Civil Code.¹⁵⁰ Article 2529 contains language reasonably supporting the conclusion that it is subsumed by redhibition, while this language is not present in article 2524. Since both of these warranties were added to the redhibition chapter in the same act during the “Sales” title revision, the express language could easily have been added to make the two articles uniform.¹⁵¹ Without this addition, it could only be presumed that the legislature intended to draw a distinction

145. *Id.*

146. *Stroderd*, 2005 WL 2037419, at *3; PPG Indus. vs. Indus. Laminates Corp., 664 F.2d 1332, 1335 (5th Cir. 1982).

147. LA. CIV. CODE ANN. art. 2524 cmt. b (1996) (emphasis added).

148. Compare LA. CIV. CODE ANN. art. 2524 cmt. b (1996), with LA. CIV. CODE ANN. art. 2529 (1996 & Supp. 2009).

149. While it can be argued conversely that the two warranties should be read *in pari materia*, thus extending the redhibition requirement to the latter, this rationale is unpersuasive in this instance. As stated previously, the LPLA incorporated express warranty as a mode of qualifying a product as “unreasonably dangerous.” Therefore, it is appropriate to allow article 2529 to be subsumed by redhibition because it is already provided under the LPLA. LA. REV. STAT. ANN. § 9:2800.58 (2009). On the other hand, the absence of such language in article 2524, combined with the fact that it is not incorporated into the LPLA, suggest that the two articles should be treated as distinguishable. MURCHISON & TRAHAN, *supra* note 59, at 168, 171.

150. 1993 La. Acts. No. 841, § 1.

151. *Id.*

between express warranty and warranty of fitness with regard to their relationships with redhibition. Since the legislature used different language in drafting article 2524 than is used in article 2529, this suggests that they have distinctive interactions with the warranty of redhibition.

Outside of *Stroderd*, the state of the law is muddy concerning the proposition that redhibition subsumes article 2524. *Cunard Line Ltd. Co. v. Datrex, Inc.*, addresses the question in the converse, stating the issue as “whether the Louisiana Civil Code article 2524 is intended to encompass the warranty against redhibitory defects so as to provide an additional cause of action for defective products.”¹⁵² In *Cunard*, the court reviewed a trial court’s grant of an exception of prescription where the purchaser of lighting systems brought suit against the seller for “‘defective design and/or installation’ of the systems.”¹⁵³ The seller argued that the one-year prescriptive period for redhibition barred the buyer’s claims, and the buyer countered that the ten-year prescription for article 2524 was applicable.¹⁵⁴ The court concluded that article 2524 “applies to a situation in which the cause of action is based, not on the defective nature of the thing at issue, but on its fitness for ordinary use and/or for a particular use or purpose.” Since the plaintiff’s cause of action was based on a defect, the claim was barred by prescription.¹⁵⁵ Simply put, *Cunard* stands for the proposition that a claim based on a defect in a thing is governed by redhibition and not warranty of fitness.

The court posited that the legislature must have intended to enact three different types of warranties applicable to sales since they gave no mention or reasoning for an overlap, and it would be “superfluous or redundant” to have three articles governing the same subject matter.¹⁵⁶ In the instances that an article 2524 claim arises out of a redhibitory defect, there is a degree of overlap that would suggest that allowing the warranty of fitness claim is not necessary for a plaintiff to recover.¹⁵⁷ Redhibition under the LPLA is recoverable to the extent of “economic loss” or “damage to the product itself,” which in essence would be the type of recovery

152. 926 So. 2d 109, 113 (La. App. 3d Cir. 2006).

153. *Id.* at 113.

154. *Id.* at 111–12.

155. *Id.* at 114.

156. *Id.* at 113. The three warranties are LA. CIV. CODE ANN. art. 2520 (1996 & Supp. 2009) (redhibition), LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009) (thing fit for ordinary use), and LA. CIV. CODE ANN. art. 2529 (1996 & Supp. 2009) (thing not of the kind specified in the contract).

157. *See supra* Part I.

sought by a plaintiff pursuing a breach of contract claim.¹⁵⁸ Moreover, since a manufacturer is presumed to be a bad faith seller under redhibition, the court can allocate attorneys' fees, which are typically only available in breach of contract claims when they are stipulated by the parties.¹⁵⁹

Thus, the extent of Harry's recoverability is not affected if we allow redhibition to subsume his breach of contract claim under article 2524. Harry has three types of losses: (1) personal injury damages; (2) damage to the dump truck; and (3) damages owed to the third party for breaching the sand-hauling obligation. Assuming that Harry can prove that the dump truck is an unreasonably dangerous product, his LPLA claim will cover his personal injuries. The redhibition exception to the Act will cover the other two types of damages: damage to the product itself and the economic losses he suffered from breaching the contract.

However, there is no express language or provision in the Civil Code that gives preference to a claim for redhibition over article 2524—as in the case of an express warranty—and it may be unfair to give such preference in a case like Harry's. Even though the buyer is able to bring a redhibitory action within one year of his discovery of the defect for the "economic loss" owed to the third party, he is vulnerable to suit by the third party with which he contracted under general conventional obligations' ten-year prescription.¹⁶⁰ It follows, then, that if the buyer is not litigious, he bears the brunt of the losses caused by the defective product. While the plaintiff can use a prescribed cause of action as a defense under Code of Civil Procedure article 424, the buyer still bears the costs of defending against litigation without remedy against the at-fault manufacturer who is deemed a bad faith seller under article 2545.¹⁶¹ Even though the recovery available to a plaintiff is virtually the same under article 2524 and redhibition in the context of damage caused by a manufacturer's products, allowing redhibition to subsume article 2524 when the warranty of fitness claim arises from a defect potentially shortchanges a vulnerable buyer in terms of prescription.

These inequities would exist if the third party sues Harry for breach of contract after his own right to bring a redhibition action against the manufacturer-seller of the truck has prescribed.

158. *Id.*

159. LA. CIV. CODE ANN. art. 2545 (1996 & Supp. 2009); LITVINOFF, *supra* note 33, at 363.

160. Kennedy, *Dimension of Time*, *supra* note 10, at 16; Bilbe, *supra* note 5, at 144.

161. Interview with William Crawford, *supra* note 11.

Remember that Harry only has one year from the discovery of the bad brakes to sue the manufacturer, while the third party has ten years to sue Harry for his failure to haul sand. Allowing the LPLA to subsume an article 2524 claim forces Harry to eat the manufacturer's liability, even though the manufacturer is presumed to be in bad faith.¹⁶²

Thus, in certain instances in which a purchaser has a breach of contract claim under article 2524, an LPLA claim, and a redhibition claim, it would be beneficial to a good faith buyer for purposes of prescription to permit the article 2524 claim. Moreover, if the redhibition prescriptive period has tolled, the plaintiff will not be recovering twice for the economic losses coverable by both redhibition and article 2524. Furthermore, since the recovery is greater for plaintiffs to proceed under redhibition due to the availability of attorneys' fees,¹⁶³ plaintiffs will not be incentivized to allow their redhibition claims to prescribe so as to reap the benefit of a longer prescriptive period under article 2524.¹⁶⁴ Rather, allowing article 2524 to operate after the redhibition claim upon which it is based prescribes will protect plaintiffs who are subject to suit by third parties due to the failure of the product, thus providing recovery of any losses incurred in spite of the manufacturer who potentially knew their intended use for the product.¹⁶⁵ Consequently, it is not clear whether the legislature intended redhibition to subsume article 2524.¹⁶⁶ However, in some instances there are compelling reasons to allow a fitness claim to stand.

IV. CONCLUSION

So is Harry's breach of contract claim subsumed by the Act or redhibition? This Comment suggests that the plain language and legislative history contemporary with the addition of article 2524 to the Louisiana Civil Code undermine the conclusion in *Stroderd* with respect to whether an article 2524 claim is subsumed by the LPLA. Theoretically, the LPLA does not subsume a breach of contract claim for warranty of fitness. However, *Stroderd* may be correct in its assertion that the redhibition claim subsumes warranty of fitness when both claims arise out of the same

162. LA. CIV. CODE ANN. art. 2545 (1996 & Supp. 2009).

163. LA. CIV. CODE ANN. art. 2520 (1996 & Supp. 2009).

164. LA. CIV. CODE ANN. art. 2524 (1996 & Supp. 2009); LA. CIV. CODE ANN. art. 2520 (1996 & Supp. 2009).

165. See *supra* Part III.C.

166. Bilbe, *supra* note 5, at 141.

characteristic. On the other hand, a claim for warranty of fitness when it arises out of redhibitory defect may not exist at all.¹⁶⁷ This is a logical conclusion when the remedies available for each claim are considered.

One of the main goals of the LPLA was to provide stability and certainty to the realm of manufacturer liability.¹⁶⁸ *Stroderd's* interpretation of the scope of the Act following the revision of the "Sales" title undermines the gains sought and initially achieved by the drafters of the Act since it creates an inconsistency with the plain language. While an examination of the legislative history suggests that it is unlikely that the legislature intended to preserve warranty of fitness from the exclusivity of the Act, the plain language of the damage provision encompasses article 2524 in its protection. However, whether a warranty of fitness claim can surmount the preemptive force of redhibition when based on the same defect is difficult to definitively confirm, but there may be compelling prescriptive reasons to allow the contract claim to survive. One scholar predicted that "[t]he effect [of the Act] will be to cut back upon the Civil Code's role in products liability and to channel these important cases into the sphere of tort."¹⁶⁹ Whether this prediction will come to fruition is dependent upon a ruling from the Louisiana Supreme Court distinguishing the *Stroderd* rule or an act by the legislature amending the damage provision to affirm it.

*Larissa Teipner**

167. See *supra* Part III.C.3.

168. Garner, *supra* note 20, at 164.

169. *Id.* at 134-35.

* The author would like to extend special thanks to William Crawford, John Church, and Brad Kline for their guidance and their contribution to this Comment.