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Buyers Beware: Understanding the Consequence of Intentionally Breaching a Real Estate Purchase Agreement in a Civil Law Jurisdiction

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Buyers Beware: Understanding the Consequence of Intentionally Breaching a Real Estate Purchase Agreement in a Civil Law Jurisdiction

*Macy P. Spencer**

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INTRODUCTION

Suppose Buyer wanted to buy a house from Seller. As is typical in contracts to buy and sell immovable property in Louisiana, Buyer and Seller entered into a real estate purchase agreement, known formally as a *contract to sell*.¹ In the purchase agreement, Buyer and Seller agreed that if either party failed to perform the contract, the breaching party owed the non-breaching party \$10,000 in stipulated damages.² A few months after signing the agreement, Buyer decided that he no longer wanted to buy the house from Seller because Buyer found a better deal for a different house. The day that the contract was supposed to close, Buyer informed Seller that Buyer intentionally failed to meet several conditions of the contract because Buyer no longer wanted to buy the house.³ Before Seller found out about Buyer's breach, Seller turned down multiple offers during the contract period and was unable to find another buyer for over six months. The market price of Seller's house plummeted by \$30,000 on the date that Buyer refused to close;⁴ Seller had to pay \$5,000 for utilities and homeowner's association dues; and Seller lost \$15,000 due to lost lease revenue for the 200 days that the house did not sell. Therefore, Seller lost \$50,000 due to the Buyer's intentional breach of the contract. The Louisiana Civil Code provides that an obligor, who intentionally breaches a contract, must pay bad faith damages as a matter of public policy, which

1. LA. CIV. CODE art. 2623 (2023).

2. Stipulated damages are damages that parties may stipulate at the formation of the contract to be recovered in case of a breach. *Id.* art. 2005.

3. Under Louisiana law, “[a] condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment.” *Id.* art. 1772.

4. *Id.* art. 1994.

would be \$50,000 in this hypothetical.⁵ However, Louisiana jurisprudence suggests that a party to a real estate purchase agreement can intentionally breach a contract containing a provision for stipulated damages, pay only the damages stipulated, and avoid the general rules for bad faith damages.⁶ Therefore, according to Louisiana jurisprudence, Buyer only owes Seller \$10,000 in damages even though Seller suffered an additional \$40,000 in damages due to Buyer's bad faith.

Stipulated damages are a key component found in a majority of real estate purchase agreements.⁷ Typically, buyers and sellers agree that in the event of a default, the non-breaching party can terminate the agreement, demand specific performance,⁸ or terminate the agreement and demand a certain sum of stipulated damages.⁹ These options are even included in the Louisiana Real Estate Commission's Purchase Agreement form, which Louisiana real estate agents are required to use.¹⁰ Although stipulated damages clauses are standard components of real estate purchase agreements, a great deal of uncertainty exists regarding the circumstances under which they will be enforced by courts.¹¹ It is well-known in Louisiana law that a stipulated damages clause cannot limit the liability of a party who intentionally breaches a contract.¹² However, Louisiana jurisprudence continuously side-stepped the relevant analysis to reach the conclusion that a party may intentionally breach a real estate purchase agreement and limit his or her liability to the agreed upon stipulated damages.¹³ Although Louisiana jurisprudence reaches a reasonable

5. See generally *id.* arts. 1997, 2004.

6. See *Bodin v. Butler*, 338 F. App'x 448 (5th Cir. 2009); *1100 S. Jefferson Davis Parkway, LLC v. Williams*, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994); *Wheeler v. Carber*, No. CV. 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012).

7. LA. REAL EST. COMM'N, LA. RESIDENTIAL AGREEMENT TO BUY OR SELL at 8 (2022) (lines 302–20).

8. JAMES S. HOLIDAY, JR. & DALE R. BARINGER, SPECIFIC PERFORMANCE AS CONTRACT REMEDY, *in* LOUISIANA PRACTICE SERIES § 8:21 (2021).

9. LA. REAL EST. COMM'N, *supra* note 7, at 8 (lines 302–20).

10. *Id.*

11. See *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008); *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203; *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994); *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); LA. CIV. CODE art. 2004 (2023).

12. LA. CIV. CODE art. 2004 (2023).

13. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*,

outcome that aligns with the commercial expectations in the real estate realm, the courts' analyses fail to acknowledge the relevant Louisiana law that contradicts the courts' outcomes.¹⁴ Therefore, the Louisiana legislature needs to act to resolve the tension between stipulated damages and intentional breaches in the real estate realm. New legislation will both provide clarity in this context, which is needed for economic stability in real estate transactions, and it will prevent the application of this dangerous precedent in other aspects of contract law.

This Comment explores the relationship between intentional breaches and stipulated damages. Part I of this Comment provides background information on Louisiana's law of damages. Part II of this Comment summarizes the issues regarding the relationship between intentional breaches and stipulated damages and critiques the relevant Louisiana Supreme Court analyses. Part III demonstrates the issues regarding the relationship between bad faith breaches and stipulated damages and explores the approaches by the Louisiana Third Circuit Court of Appeal, United States District Court for the Eastern District of Louisiana, United States Court of Appeals for the Fifth Circuit, Louisiana Fourth Circuit Court of Appeal, and United States District Court for the Middle District of Louisiana. Part IV of this Comment critiques the courts' analyses for the failure to: (1) consider the policy reasonings that support the notion that a bad faith breach nullifies a stipulated damages clause; (2) interpret the civilian definition of bad faith; and (3) apply the relevant Louisiana law. Part IV also discusses the public policy reasons that support the courts' reasonable outcome that an intentional breach should not nullify a stipulated damages clause in a real estate purchase agreement.¹⁵ Lastly, Part V of this Comment proposes that the Louisiana legislature should enact a new article under the Sales title of the Civil Code to clarify this issue in the real estate realm and amend two comments to an existing article.

643 So. 2d 203; *Lombardo*, 647 So. 2d 1086; *Heirs of Gremillion*, 493 So. 2d 584; LA. CIV. CODE art. 2004 (2023).

14. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203; *Lombardo*, 647 So. 2d 1086; *Heirs of Gremillion*, 493 So. 2d 584; LA. CIV. CODE art. 2004 (2023).

15. Part IV specifies that the public policy reasons that support the courts' reasonable outcome should only apply in the context of real estate purchase agreements.

I. LOUISIANA DAMAGES AND REMEDIES

Under Louisiana law, “[a]n obligor is liable for the damages caused by his failure to perform a conventional obligation.”¹⁶ Louisiana law recognizes several types of damages.¹⁷ In Louisiana, general damages include good faith damages, bad faith damages, and stipulated damages, all of which are found under the Conventional Obligations title of the Louisiana Civil Code.¹⁸ Additionally, Louisiana law recognizes certain remedies specific to breaches of sales agreements, which can be found under the Sales title of the Civil Code.¹⁹ These damages will be explored in turn.

A. General Conventional Obligation Damages

In Louisiana, if an obligor fails to perform a conventional obligation, the damages are measured by the loss that the obligee sustained and the profits deprived.²⁰ In the hypothetical above, Seller, the obligee, sustained \$50,000 in damages. The damages were measured by the market price of Seller’s house on the date that Buyer refused to close, the price Seller had to pay for utilities and homeowner’s association dues, and the amount of money Seller lost due to lost lease revenue for the 200 days that the house did not sell.

1. Good Faith Damages and Bad Faith Damages

Additionally, the amount of damages due to the obligee depends upon whether the obligor breached in good faith or bad faith.²¹ According to established Louisiana civil law doctrine, good faith is the general duty of

16. LA. CIV. CODE art. 1994 (2023). “A ‘conventional’ obligation is ‘an obligation arising from an agreement between the parties; [a conventional obligation is] a contractual obligation.’” *ASI Fed. Credit Union v. Leotran Armored Sec., LLC*, 259 So. 3d 1141, 1148 n.12 (La. Ct. App. 5th Cir. 2018) (quoting Conventional, BLACK’S LAW DICTIONARY (7th ed. 1999)). The contract is the law between the parties, and the contract must be performed in good faith. *See* LA. CIV. CODE art. 1983 (2023).

17. *See generally* LA. CIV. CODE arts. 1989–2012 (2023).

18. *See id.* arts. 1906–2291.

19. *Id.* arts. 2623–24 (including remedies such as deposits, earnest money, and specific performance).

20. *Id.* art. 1994.

21. *Id.* arts. 1996–97.

honest and fair behavior.²² An obligor breaching a contract in good faith is “liable only for the damages that were foreseeable at the time the contract was made.”²³ An example of foreseeable damages is illustrated in *Noyes v. F.A. Noullet & Company*.²⁴ In *Noyes*, the Louisiana Supreme Court found that a general contractor was entitled to the wages of workmen and cost of machinery as foreseeable damages for an unreasonable delay in the execution of a contract by a subcontractor.²⁵ Due to the subcontractor’s experience and familiarity with the trade, these damages “could not have escaped the contemplation of the subcontractor” when the subcontractor initially agreed to the contract.²⁶ However, the breaching party was not liable for any damage to the business reputation because parties cannot foresee those damages at the time of contracting.²⁷

A good faith obligor is liable only for foreseeable damages, due to the longstanding principle that foresight lies at the foundation of a contract.²⁸ An obligor binds himself to a contract only because the obligor can foresee the advantage of the contract and anticipate the consequence of his failure to perform his obligation of the contract.²⁹ Foreseeability and anticipation are key components to the psychological process of consent, which is always needed to form a contract.³⁰ As a policy matter, Louisiana law does not hold good faith obligors liable for damages they could not have foreseen at the outset of the contract because the obligor could not have consented to such liability.³¹ Therefore, a good faith obligor is only liable for foreseeable damages.³²

Contrary to a good faith breach, which leads to an award of only foreseeable damages, an obligor breaching a contract in bad faith is liable for foreseeable and unforeseeable damages that are direct consequences of

22. ALAIN A. LEVASSEUR, *LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A PRECIS* 84 n.19 (2015).

23. LA. CIV. CODE art. 1996 (2023).

24. *Noyes v. F.A. Noullet & Co.*, 43 So. 539 (La. 1907).

25. *Id.*

26. SAUL LITVINOFF & RONALD J. SCALISE JR., *FORESEEABILITY AT THE TIME OF CONTRACTING*, in 6 *LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS* § 5.10 (2d ed. 2020).

27. *Noyes*, 43 So. at 539.

28. SAUL LITVINOFF & RONALD J. SCALISE JR., *THE GENERAL PRINCIPLE*, in 6 *LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS*, *supra* note 26, § 5.8 [hereinafter Litvinoff & Scalise § 5.8].

29. *Id.*

30. LA. CIV. CODE art. 1927 (2023); Litvinoff & Scalise § 5.8, *supra* note 28.

31. Litvinoff & Scalise § 5.8, *supra* note 28.

32. *Id.*; LA. CIV. CODE art. 1996 (2023).

his failure to perform.³³ Although the Louisiana Civil Code does not define bad faith, comment (c) to article 1997 defines bad faith as an obligor's "intentional and malicious failure to perform."³⁴ This definition of bad faith is widely accepted by Louisiana courts; however, the comment is not binding law.³⁵ Despite the fact that comment (c) lacks binding authority and contradicts the civilian definition of bad faith, it must be recognized that some Louisiana courts define bad faith as an obligor's "intentional and malicious failure to perform."³⁶

Because a bad faith obligor is liable for foreseeable and unforeseeable damages, an obligor effectively increases the extent of liability by breaching in bad faith.³⁷ However, the bad faith obligor's liability is limited to foreseeable and unforeseeable damages that are a direct consequence of an obligor's failure to perform; a bad faith obligor is not liable for indirect damages.³⁸ Indirect damages are damages that are not only caused by the obligor's fault, but also caused by other factors that

33. LA. CIV. CODE art. 1997 (2023).

34. LA. CIV. CODE ANN. art. 1997 cmt. c (2021). The French version of article 1997 uses the term *dol* which does not translate to fraud. Therefore, fraud falls under the category of bad faith; however, bad faith is broader than solely fraud. *Id.*; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1151 (Fr.) (1804) ("Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé que ce qui est une suite immédiate et directe de l'inexécution de la convention.") ["Even in the case where the non-performance of the agreement is due to the debtor's intentional breach, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an immediate and direct consequence of the non-performance of the agreement."].

35. The Louisiana Supreme Court acknowledged that the "statements contained in the official comments are not part of the statute, and are not binding on this court, although we do not discount them entirely." *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 797 (La. 2005); LA. CIV. CODE ANN. art. 1997 cmt. c (2021); LEVASSEUR, *supra* note 22, at 84 n.19; *see* *Great S.W. Fire Ins. Co. v. CNA Ins. Co.*, 557 So. 2d 966, 969 (La. 1990); *Bodin v. Butler*, 338 F. App'x 448, 452 (5th Cir. 2009); *Am. Bank & Tr. of Coushatta, La. v. F.D.I.C.*, No. 91-2268, 1995 WL 363432, at *5 (W.D. La. Sept. 16, 1993); *Volentine v. Raeford Farms of La., LLC*, 201 So. 3d 325, 338 (La. Ct. App. 2d Cir. 2016).

36. LA. CIV. CODE ANN. art. 1997 cmt. c (2021); *see* *Great S.W. Fire Ins.*, 557 So. 2d at 969; *Bodin*, 338 F. App'x at 452; *Am. Bank & Tr. of Coushatta*, 1995 WL 363432, at *5; *Volentine*, 201 So. 3d at 338.

37. LA. CIV. CODE art. 1997 (2023); LITVINOFF & SCALISE, *supra* note 28, *in* LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS, *supra* note 26, § 5.19.

38. Litvinoff & Scalise § 5.8, *supra* note 28.

intervene in the chain of causality.³⁹ For example, suppose Seller wants to sell a cow to Buyer. If Seller sells the cow to Buyer and knows that the cow has a disease, Seller will be liable for the death of the diseased cow and for the infection that spread to the other animals on Buyer's farm.⁴⁰ However, Seller would not be liable for any damages involving the cultivation of Buyer's land or any damages related to creditors seizing Buyer's land because these damages are too indirect.⁴¹

A bad faith obligor is liable for foreseeable and unforeseeable damages due to the longstanding policy that contracts must be performed in good faith.⁴² The notion that a bad faith obligor is liable for foreseeable and unforeseeable damages dates back to Roman law, which also emphasized good faith dealings.⁴³ The Roman Digest distinguished between the limitation of damages for a party who ignorantly sold a diseased flock versus a party who knowingly and secretly sold the diseased flock.⁴⁴ The party who knowingly and secretly sold the diseased flock was liable for all damages the purchaser sustained from the sale.⁴⁵ The distinction between good and bad faith damages continued to exist in Roman law and was adopted by French law as well.⁴⁶ A bad faith obligor's liability is limited to those unforeseeable damages that are a

39. *Id.*

40. SAUL LITVINOFF & RONALD J. SCALISE JR., HISTORICAL BACKGROUND AND A PROVERBIAL EXAMPLE, *in* LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS, *supra* note 26, § 5.24 [hereinafter Litvinoff & Scalise § 5.24]; Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 742 (2007).

41. Litvinoff & Scalise § 5.24, *supra* note 40; Scalise, *supra* note 40, at 742.

42. LA. CIV. CODE art. 1983 (2023). The French Civil Code, along with a majority of civil law systems, adopted laws to require parties to negotiate and execute a contract in good faith. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1104 (Fr.) (2016) ("Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public") ["Contracts must be negotiated, formed and executed in good faith. This provision is of public order."]; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1151 (Fr.) (1804). The language of article 1151 of the French Civil Code of 1804 is similar to the language Louisiana Civil Code article 1997. *See* LA. CIV. CODE art. 1997 (2023).

43. Scalise, *supra* note 40, at 739.

44. *Id.* (citing Dig. 19.1.13 (Ulpian, Edict 32); Dig. 19.1.37 (Paul, Plautius 7)).

45. *Id.*

46. The French also adopted the distinction between good and bad faith, but it was amended so that a bad faith seller would only be liable for damages the purchaser sustained from the sale that were not too remote from the consequence of the breach. *Id.* at 741.

direct consequence of his or her failure to perform because there must be a line drawn to determine the liability of an obligor to promote reasonableness.⁴⁷ Without a reasonable limitation on the directness of damages, a bad faith obligor's liability would be an unbearable burden.⁴⁸

2. *Stipulated Damages*

In addition to general damages, a party may contract for his or her liability by agreeing to stipulated damages.⁴⁹ Stipulated damages are the amount of damages upon which the parties agreed at contract formation to be recovered “in case of nonperformance, defective performance, or delay in performance of an obligation.”⁵⁰ When parties agree to stipulated damages, the law offers two different remedies: specific performance or dissolution.⁵¹ Specific performance is a remedy by which the court orders the breaching party to perform his or her obligation as agreed upon in the contract.⁵² The other remedy is dissolution of the contract and the stipulated damages substitute for performance.⁵³ In a real estate agreement, if the seller breached the agreement, the buyer would most likely prefer specific performance because the court would order the seller to follow through with the sale. However, if the buyer breached the contract, then the seller would most likely prefer dissolution and the stipulated damages, especially if lack of financing caused the buyer to breach the contract.

The well-known Louisiana Supreme Court case of *Lama v. Manale* provides an example of a contractual stipulated damages clause:

At the expiration of this lease or its termination for other causes, Lessee is to immediately surrender possession by actual delivery of all keys at Lessor's place of business, the premises to be left broom clean and all trash removed, and should Lessee fail to surrender possession he consents to pay as liquidated damages five times the rent per day for every day of his failure to do so,

47. SAUL LITVINOFF & RONALD J. SCALISE JR., UNFORSEEABLE, INDIRECT AND SPECULATIVE DAMAGES, *in* LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS, *supra* note 26, § 5.26.

48. *Id.*

49. LA. CIV. CODE arts. 1996–97, 2005 (2023).

50. *Id.* art. 2005.

51. DIAN TOOLEY-KNOBLETT & DAVID GRUNING, AGREEMENTS AFFECTING THE RIGHT TO SPECIFIC PERFORMANCE, *in* 24 LOUISIANA CIVIL LAW TREATISE: LAW OF SALES § 5.11 (2021) [hereinafter Tooley-Knoblett & Gruning § 5:11].

52. HOLIDAY, *supra* note 8, § 8:21.

53. Tooley-Knoblett & Gruning § 5:11, *supra* note 51.

with attorney's fees, costs, etc.⁵⁴

In this example, the lessee agreed to return the keys of the leased property, clean the leased property, and remove the trash.⁵⁵ For every day that the lessee failed to return the keys to the lessor, the lessee agreed to pay five times the rent per diem for every day that he did not meet those requirements.⁵⁶

Generally, parties have a broad freedom to contract.⁵⁷ Therefore, courts typically enforce stipulated damages clauses.⁵⁸ However, Louisiana Civil Code article 2012 regulates stipulated damages clauses to ensure that they are not unreasonably high or unreasonably low.⁵⁹ Louisiana Civil Code article 2012 provides that the court may not modify stipulated damages “unless they are so manifestly unreasonable as to be contrary to public policy.”⁶⁰ Stipulated damages clauses are presumed reasonable,⁶¹ and the non-breaching party does not need to prove the actual damage incurred to enforce the stipulated damages clause.⁶² Rather, the burden is on the breaching party to prove that the clause is against public policy.⁶³ This rule—enforcing stipulated damages unless they are “manifestly unreasonable as to be contrary to public policy”—balances the theories of contractual freedom and equity, which date back to the original articles of the Code Napoleon.⁶⁴

54. *Lama v. Manale*, 50 So. 2d 15, 16 (La. 1950).

55. *Id.*

56. *Id.*

57. LA. CIV. CODE art. 1971 (2023).

58. *See Lama*, 50 So. 2d at 17; *see also Grimsley v. Lenox*, 643 So. 2d 203, 206 (La. Ct. App. 3d Cir. 1994).

59. LA. CIV. CODE art. 2012 (2023).

60. *Id.*

61. *Express Lien, Inc. v. Handle, Inc.*, No. 19-10156, 2021 WL 2537032, at *5 (E.D. La. June 21, 2021).

62. LA. CIV. CODE art. 2009 (2023).

63. *Express Lien*, 2021 WL 2537032, at *5.

64. LA. CIV. CODE art. 2012 (2023); SAUL LITVINOFF & RONALD J. SCALISE JR., *LOUISIANA LAW*, in 6 *LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS*, *supra* note 26, § 13.6.

At the time of its enactment, in the section devoted to damages for failure to perform an obligation, the Code Napoleon contained an Article according to which when the contract provided that the party who failed to perform it would pay a certain sum as damages, the other party was not to be awarded a sum greater or smaller than that.

SAUL LITVINOFF & RONALD J. SCALISE JR., *THE FRENCH CIVIL CODE*, in 6 *LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS*, *supra* note 26, § 13.5.

Although Louisiana Civil Code article 2012 aims to regulate stipulated damages clauses, Louisiana courts are hesitant to modify stipulated damages, even if the outcome results in harsh consequences.⁶⁵ Consider the aforementioned stipulated damages clause from *Lama v. Manale*.⁶⁶ In *Lama*, the lessee failed to return the keys of the leased property for 543 days after the expiration of the lease.⁶⁷ Based on the stipulated damages clause, the lessor sued the lessee for five times the per diem rent for 543 days in addition to attorney's fees and court costs.⁶⁸ The lessee, based on this calculus, owed the lessor \$15,620.42.⁶⁹ Despite this seemingly harsh result for simply failing to return the keys, the Louisiana Supreme Court upheld the stipulated damages clause and required the lessee to pay more than five times the amount of actual damages that occurred.⁷⁰

Even though Louisiana courts are hesitant to modify stipulated damages clauses pursuant to Louisiana Civil Code article 2012, there is an additional article that regulates stipulated damages clauses as well.⁷¹ Louisiana Civil Code article 2004 provides that parties cannot agree to a clause that “in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.”⁷² A clause that excludes or limits an obligor's liability would subject one party's obligation to a purely potestative suspensive condition because a party would be free to perform or not to perform at will.⁷³ Contracts with such

The provision was strictly enforced and intended that the courts would not be able to modify the award. *Id.* It was enacted “to prevent judges from tampering with contracts in order to protect contractual stability.” *Id.* However, it became oppressive. As a result, the French system now allows for courts to modify these damages but only when the clause is either manifestly excessive or manifestly derisory. *Id.*

65. See *Lama v. Manale*, 50 So. 2d 15, 16 (La. 1950).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 17.

71. See *id.* 16; LA. CIV. CODE arts. 2004, 2012 (2023).

72. LA. CIV. CODE art. 2004 (2023).

73. LA. CIV. CODE ANN. art. 2004 cmt. a (2021) (citing *Freeman v. Dep't of Highways*, 253 La. 105 (1968)). A potestative condition is a condition that “on its face [shows] that obligor is not required to perform and that he may or may not fulfill it according to his desire.” *Stephen L. Guice & Co. v. Perkowski*, 12 So. 2d 692, 695 (La. Ct. App. Orleans 1943) (citing LA. CIV. CODE arts. 2024, 2034, 2035 (2023)). A condition is suspensive “[i]f the obligation may not be enforced until the uncertain event occurs,” and “[a] suspensive condition that depends solely on the whim of the obligor makes the obligation null.” LA. CIV. CODE arts. 1767,

conditions are null.⁷⁴ Moreover, allowing a party to contractually limit his or her liability for intentional or gross fault destroys the principle of good faith and transgresses public policy.⁷⁵ Therefore, under Louisiana law, an intentional breach of a contract that causes damage to the other party nullifies a stipulated damages clause.⁷⁶

Good faith and bad faith damages are the general types of damages for breach of a conventional obligation.⁷⁷ A party may contractually determine his or her liability by agreeing to stipulated damages at the formation of the contract, and Louisiana courts remain hesitant to modify stipulated damages clauses.⁷⁸ Despite the courts' hesitation to modify these clauses pursuant to Louisiana Civil Code article 2012, Louisiana Civil Code article 2004 clearly states that an intentional breach of a contract nullifies a stipulated damages clause.⁷⁹ Real estate purchase agreements are subject to these general rules of conventional obligations;⁸⁰ however, there is a different title of the Code that sets forth additional rules for contracts to sell.⁸¹

B. Real Estate Remedies

Under the Sales title of the Code, there are two types of remedies associated with breaches of contracts to sell: deposits and earnest money.⁸² Earnest money is similar to stipulated damages because it allows the parties to contract for their liability.⁸³ However, there are some important differences.⁸⁴ According to Louisiana Civil Code article 2624:

If the parties stipulate that a sum given by the buyer to the seller is earnest money, either party may recede from the contract, but

1770 (2023). Purely potestative suspensive conditions are null. LA. CIV. CODE ANN. art. 2004 cmt. a (2021).

74. LA. CIV. CODE ANN. art. 2004 cmt. a (2021).

75. *Id.*

76. LA. CIV. CODE art. 2004 (2023).

77. *Id.* arts. 1996, 1997.

78. *Id.* art. 2005; *see* *Lama v. Manale*, 50 So. 2d 15 (La. 1950); *see also* *Grimsley v. Lenox*, 643 So. 2d 203, 206 (La. Ct. App. 3d Cir. 1994).

79. *See* LA. CIV. CODE arts. 2004, 2012 (2023).

80. A real estate purchase agreement is a contract to sell. A contract to sell is a nominate contract, subject to general rules of conventional obligations. *Id.* arts. 1914–15, 2005.

81. *Id.* arts. 2623–24.

82. *Id.* art. 2624.

83. Tooley-Knoblett & Gruning § 5:11, *supra* note 51.

84. *Id.*

the buyer who chooses to recede must forfeit the earnest money, and the seller who so chooses must return the earnest money plus an equal amount.⁸⁵

Unlike stipulated damages clauses, earnest money negates the availability of specific performance.⁸⁶ Stipulated damages give the obligee the option to seek either specific performance or dissolution, in which the stipulated damages will substitute for performance.⁸⁷ In contrast, when earnest money is paid, either party can recede from the contract without concern that the other party will seek its enforcement; the party who recedes simply forfeits the earnest money, in the case of the buyer, or pays an amount equal to the earnest money, in the case of the seller.⁸⁸

The concept of earnest money traces back to early Roman law.⁸⁹ In classical Roman law, earnest money was known as *arra*.⁹⁰ In Roman times, *arra* was a valuable object, such as jewelry or money, that a buyer delivered to his seller, and it assured the seller of the buyer's "serious intention to acquire the property and eventually to pay the purchase price."⁹¹ *Arra* served the function of a penalty or liquidated damages.⁹² If the buyer failed to perform, the seller retained the *arra* as damages; if the seller failed to perform, the buyer recovered the *arra* from the seller and recovered a similar amount as damages.⁹³

In 1804, the French Code drafters adopted the concept of *arra* as earnest in Code Civil article 1590.⁹⁴ Code Civil article 1590 provides, "If the promise to sell has been accompanied by earnest, either party is free to withdraw from it, the party who has given the earnest on terms of forfeiting

85. LA. CIV. CODE art. 2624 (2023).

86. Tooley-Knoblett & Gruning § 5:11, *supra* note 51.

87. *Id.*

88. LA. CIV. CODE art. 2624 (2023).

89. Tooley-Knoblett & Gruning § 5:11, *supra* note 51.

90. Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 310 (1995).

91. *Id.*

92. *Id.* at 311. A liquated damages clause is synonymous with a stipulated damages clause.

93. *Id.*

94. *Id.* (citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1590 (Fr.) (1804) ("Si la promesse de vendre a été faite avec des arrhes chacun des contractants est maître de s'en départir, Celui qui les a données, en les perdant, Et celui qui les a reçues, en restituant le double.")] ["If the promise to sell has been accompanied by earnest, either party is free to withdraw from it, the party who has given the earnest on terms of forfeiting it, the party who has received the earnest on terms of repaying double."]).

it, the party who has received the earnest on terms of repaying double.”⁹⁵ Louisiana adopted the legal concept of earnest money and codified it in Louisiana Civil Code article 2624.⁹⁶

Although the legal effects of earnest money have always been clear, ambiguity existed regarding the criteria to differentiate earnest money from a true deposit.⁹⁷ A deposit is distinguished from earnest money because a deposit “neither negates the availability of specific performance nor fixes the amount of damages that might be recovered from the party who has breached the contract.”⁹⁸ The 1995 Sales Revision filled this legislative gap and required the buyer and seller to expressly provide in the contract that the sum given by the buyer to the seller is earnest money.⁹⁹ If the parties express that the sum is earnest money, then the only remedy a non-breaching party can recover is the earnest money.¹⁰⁰ If the parties do not express that the sum is earnest, then the sum is deemed a *deposit on account of the price*.¹⁰¹

Although the general damages of conventional obligations should apply to real estate agreements just as the general damages apply to other contracts, some Louisiana courts appear to treat real estate purchase agreements differently than other contracts.¹⁰² As a result, Louisiana courts have inconsistently ruled on issues relating to stipulated damages in real estate purchase agreements.¹⁰³

95. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1590 (Fr.) (1804).

96. Herman, *supra* note 90, at 311; LA. CIV. CODE art. 2624 (2023).

97. Tooley-Knoblett & Gruning § 5:11, *supra* note 51. “A sum given by the buyer to the seller in connection with a contract to sell is regarded to be a deposit on account of the price, unless the parties have expressly provided otherwise.” LA. CIV. CODE art. 2624 (2023).

98. Tooley-Knoblett & Gruning § 5:11, *supra* note 51.

99. LA. CIV. CODE art. 2624 (2023). If the contract does not expressly classify the sum as earnest money, then it is presumed to be a deposit. Therefore, by default, the non-breaching party may seek either specific performance or dissolution upon the other party’s breach. If the non-breaching party seeks dissolution, then that party may demand compensatory damages. Tooley-Knoblett & Gruning § 5:11, *supra* note 51; LA. CIV. CODE art. 2624 (2023).

100. Tooley-Knoblett & Gruning § 5:11, *supra* note 51.

101. LA. CIV. CODE art. 2624 (2023).

102. *See Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *1100 S. Jefferson Davis Parkway, LLC v. Williams*, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012); *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994); *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994).

103. *See Bodin*, 2008 WL 2951345; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203; *Lombardo*, 647 So. 2d 1086.

II. THE RELATIONSHIP BETWEEN INTENTIONAL BREACHES AND STIPULATED DAMAGES

As previously stated, a majority of real estate purchase agreements contain a stipulated damages clause.¹⁰⁴ As the following cases will demonstrate, it is common for a buyer to intentionally breach a real estate purchase agreement and expect his or her liability to be limited to the stipulated damages clause.¹⁰⁵ The Louisiana Supreme Court upheld that notion in *Heirs of Gremillion v. Rapides Parish Police Jury* and *Lombardo v. Deshotel*.¹⁰⁶ Although the Louisiana Supreme Court's holdings reach a reasonable outcome, the analyses failed to apply the relevant Louisiana law—which contradicts the holdings.

A. Louisiana Supreme Court

The following Louisiana Supreme Court cases support the notion that stipulated damages are controlling despite an intentional breach.¹⁰⁷ In the case of *Heirs of Gremillion v. Rapides Parish Police Jury*, the buyer purchased a piece of property across from the sellers for a drainage ditch, and the purchase agreement was conditioned upon the buyer building a bridge over the canal.¹⁰⁸ In the contract, the parties agreed to a stipulated damages sum of \$6,600 in the event of a default by either party.¹⁰⁹ The buyer dug the drainage ditch but failed to build the bridge.¹¹⁰ As a result, the sellers sued for specific performance, and the court of appeal ordered the specific performance of the contract.¹¹¹ Despite a court order, the buyer again failed to fulfill the condition of building the bridge, and the sellers again brought suit.¹¹² The sellers demanded \$250,000 in damages; however, the sellers' recovery was limited to the stipulated damages of \$6,600.¹¹³ The Court held that the "sum stipulated in the stipulated

104. LA. REAL EST. COMM'N., *supra* note 7, at 8 (lines 302–20).

105. *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); *Lombardo*, 647 So. 2d 1086.

106. *Heirs of Gremillion*, 493 So. 2d at 587; *Lombardo*, 647 So. 2d at 1091.

107. *Heirs of Gremillion*, 493 So. 2d at 586.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 588.

damages clause replaces the damage which would have been awarded by the court.”¹¹⁴

The Louisiana Supreme Court noted that “an obligor in bad faith is liable for all damages that are the immediate and direct consequence of the breach” and defined bad faith as “a breach of contract from some motive of interest or ill will; or an intentional or malicious failure to perform.”¹¹⁵ However, the *Heirs of Gremillion* Court did not analyze whether the breach was a bad faith breach.¹¹⁶ Therefore, the Louisiana Supreme Court limited recovery to the stipulated damages without any exploration of the relationship between the stipulated damages clause and the other rules of damages for intentional breaches.¹¹⁷

Eight years later, the Louisiana Supreme Court addressed the relationship between stipulated damages and an intentional breach.¹¹⁸ In *Lombardo v. Deshotel*, the buyer and the seller signed an agreement to purchase property.¹¹⁹ The stipulated damages clause in the agreement provided that “[i]n the event the purchaser fails to comply with this Agreement within the time specified, the seller shall have the right to declare the deposit . . . fortified [sic] . . . or the seller may demand specific performance.”¹²⁰ The buyer refused to purchase the property, and the seller sued for specific performance.¹²¹ While the suit was pending, the seller sold the property to a third party for \$25,000 less than the original purchase price and amended her action to assert an additional claim for damages against the buyer.¹²² The Louisiana Supreme Court found that the seller could recover only the \$1,000 in stipulated damages.¹²³ In its opinion, the Court discussed the relevant code articles of the Louisiana Civil Code of 1870 that resembled the Code Napoleon code articles and concluded that the articles of the Louisiana Civil Code of 1870 conveyed “the notion that the parties to a contract should be held to their agreed estimate of damages no matter what the circumstances.”¹²⁴ The *Lombardo* Court noted that the

114. *Id.* at 587.

115. *Id.*

116. *Id.*

117. *See id.*

118. *Lombardo v. Deshotel*, 647 So. 2d 1086, 1089 (La. 1994).

119. *Id.*

120. *Id.* (alterations in original).

121. *Id.*

122. *Id.*

123. *Id.* at 1092.

124. *Id.* at 1091. Civil Code articles 2117–29 are the relevant code articles of the Louisiana Civil Code of 1870 which closely followed articles 1226–33 of the Code Napoleon. *Id.*

intent of the redactors and legislators of the 1984 Civil Code revision was to make stipulated damages more “useful and predictable.”¹²⁵ Therefore, the *Lombardo* Court concluded that the stipulated damages clause controlled despite the buyer’s intentional breach of the contract.¹²⁶

B. Critique of the Louisiana Supreme Court’s Analyses

Both of the above Louisiana Supreme Court cases involved an intentional breach of a real estate purchase agreement that contained a stipulated damages clause.¹²⁷ In both *Heirs of Gremillion* and *Lombardo*, the Louisiana Supreme Court concluded that the non-breaching party’s recovery was limited to the stipulated damages clause, despite the buyer’s intentional breach of the contract.¹²⁸ The analyses of these cases are flawed because the Louisiana Supreme Court did not apply Louisiana Civil Code article 2004, despite its relevancy.¹²⁹

Louisiana Civil Code article 2004 provides, “Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.”¹³⁰ Therefore, Louisiana Civil Code article 2004 clearly states that an intentional breach of a contract nullifies a stipulated damages clause.¹³¹ Under current Louisiana law, the Louisiana Supreme Court should have included the application of article 2004 in its analyses because both cases involved an intentional breach.¹³² In applying article 2004, the Louisiana Supreme Court should have held that the intentional breaches nullified the stipulated damages clauses in both cases.¹³³

III. LOUISIANA’S DAMAGED JURISPRUDENCE

The Louisiana Supreme Court is not the only court that failed to apply Louisiana Civil Code article 2004 in cases involving an intentional breach

125. *Id.*

126. *Id.*

127. *See Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); *see also Lombardo*, 647 So. 2d 1086.

128. *See Heirs of Gremillion*, 493 So. 2d 584; *see also Lombardo*, 647 So. 2d 1086.

129. *See Heirs of Gremillion*, 493 So. 2d 584; *see also Lombardo*, 647 So. 2d 1086.

130. LA. CIV. CODE art. 2004 (2023).

131. *Id.*

132. *See Heirs of Gremillion*, 493 So. 2d 584; *Lombardo*, 647 So. 2d 1086; LA. CIV. CODE art. 2004 (2023).

133. LA. CIV. CODE art. 2004 (2023).

and a stipulated damages clause.¹³⁴ The following cases have similar facts as before—a party intentionally breached a real estate purchase agreement that contained a stipulated damages clause, and the non-breaching party sought damages.¹³⁵ Rather than applying Louisiana Civil Code article 2004, various federal and Louisiana state courts took a different approach.¹³⁶ The analyses focused on whether a bad faith breach nullifies the stipulated damages clause.¹³⁷ Some courts limited recovery to the stipulated damages clauses regardless of whether there was a bad faith breach.¹³⁸ Other courts held that if a bad faith breach was found, the breaching party would be liable for foreseeable and unforeseeable damages.¹³⁹ In addition to that issue, most of the courts also addressed whether an intentional, but not malicious, breach is considered a bad faith breach.¹⁴⁰ Some courts held that bad faith required an intentional *and* malicious breach of a contract, while other courts held that bad faith is an intentional *or* malicious breach of a contract.¹⁴¹

134. See *Heirs of Gremillion*, 493 So. 2d 584; *Lombardo*, 647 So. 2d 1086; LA. CIV. CODE art. 2004 (2023); *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008); *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin v. Butler*, 338 F. App'x 448 (5th Cir. 2009); 1100 S. Jefferson Davis Parkway, LLC v. Williams, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012); *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994).

135. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203.

136. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203.

137. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203.

138. See *Bodin*, 2008 BL 297876; *Grimsley*, 643 So. 2d 203.

139. See *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423.

140. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211.

141. See *Wheeler*, 2012 WL 13001423.

A. *Louisiana Third Circuit Court of Appeal*

In the same year that the Louisiana Supreme Court decided *Lombardo*, the Louisiana Third Circuit Court of Appeal decided *Grimsley v. Lenox*.¹⁴² In *Grimsley*, the buyers and seller entered into a real estate purchase agreement containing a stipulated damages clause.¹⁴³ The agreement was contingent upon the buyers obtaining financing.¹⁴⁴ The buyers were not able to obtain a loan because the buyers failed to disclose a student-loan judgment against one of the buyers.¹⁴⁵ Although the court found that the failure to disclose the student loan judgment was a bad faith breach, the court did not define bad faith.¹⁴⁶ Nevertheless, despite finding that the buyer breached in bad faith, the court held that the bad faith obligor only had to pay \$500 in stipulated damages rather than the \$15,000 in actual damages without providing an explanation regarding the relationship between the stipulated damages clause and bad faith breaches.¹⁴⁷

B. *United States District Court for the Eastern District of Louisiana*

The same result was also reached at the federal level by the United States District Court for the Eastern District of Louisiana.¹⁴⁸ In *Bodin v. Butler (Bodin I)*,¹⁴⁹ the buyers and the seller entered into a purchase agreement that contained a stipulated damages clause.¹⁵⁰ The stipulated damages clause provided that, in the event the buyers failed to comply with the agreement within the time specified, the “[seller] shall have the right to demand specific performances or, at [the seller’s] option, [the seller] shall have the right to reoffer the property for sale and may declare the deposit, ipso facto, forfeited, without formality beyond tender of title to [the buyer].”¹⁵¹ As a condition to closing, the buyers were required to obtain financing.¹⁵² However, when the buyers decided they no longer

142. *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994); *Grimsley*, 643 So. 2d 203.

143. *Grimsley*, 643 So. 2d at 204.

144. *Id.* at 204–05.

145. *Id.*

146. *Id.*

147. *Id.* at 206.

148. *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008).

149. *Id.*

150. *Id.* at *1–2. As the court acknowledged in its opinion, this was a stipulated damages clause and not earnest money because the parties had the right to specific performance if they chose. *Id.* at *2–3.

151. *Id.* at *2.

152. *Id.* at *1.

wanted the house, they chose to not obtain financing, thus breaching the contract.¹⁵³ Consequently, the sellers resold their house to another party and received \$80,000 less than the original contract with the buyers.¹⁵⁴

Additionally, 231 days had elapsed between the original buyers' breach and the sale to the third party.¹⁵⁵ During that period, the seller incurred several costs and related expenses such as "expenses for their mortgage note, flood insurance payments, homeowner's association dues, utility payments, repair costs, landscaping charges, termite inspection, and lawn sprinkler—a total of \$59,031.01."¹⁵⁶ Despite the stipulated damages clause, the seller sued the buyers to recover damages relating to these expenses.¹⁵⁷ According to the seller, the stipulated damages clause was inapplicable because the buyers breached in bad faith.¹⁵⁸ Accordingly, the seller believed that the buyers should be liable for both foreseeable and unforeseeable damages, not just the amount of the stipulated damages clause.¹⁵⁹

The *Bodin I* court reasoned that if bad faith nullified a stipulated damages clause, stipulated damages clauses would lose much of their usefulness.¹⁶⁰ As the United States District Court for the Eastern District of Louisiana explained, stipulated damages clauses are useful because they generally discourage litigation.¹⁶¹ If bad faith voids stipulated damages clauses, then parties "entitled to stipulated damages could simply allege bad faith and bring contract suits to try to recover more than they have stipulated."¹⁶² The court further explained that bad faith should not nullify a stipulated damages clause because it "would undermine the usefulness of stipulated damages clauses" forcing parties "to litigate the bad faith issue, which is often fact-specific and difficult to resolve in the early stages of litigation."¹⁶³ Therefore, the *Bodin I* court concluded that an obligor's liability is limited to the stipulated damages clause, regardless of bad faith.¹⁶⁴

153. *Id.*

154. *Id.*

155. *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 5122354, at *2 (E.D. La. Dec. 4, 2008).

156. *Id.*

157. *Bodin*, 2008 BL 297876, at *1.

158. *Id.* at *4.

159. *Id.* at *4–5.

160. *Id.* at *6.

161. *Id.*

162. *Id.* at *6–7.

163. *Id.* at *7.

164. *Id.* at *6.

However, just four days after the *Bodin I* judgment, the same court, in *Bodin II*,¹⁶⁵ vacated part of its opinion.¹⁶⁶ In particular, the court vacated the part of its decision that held that an obligor's liability is limited to the stipulated damages clause regardless of a bad faith breach because that discussion was "dicta that was unnecessary to the decision and an unnecessary discussion of unresolved state law."¹⁶⁷ Therefore, the *Bodin II* court focused its analysis on whether the buyers acted in bad faith.¹⁶⁸ In its analysis, the *Bodin II* court indicated that if the buyers were found to be in bad faith, they would be liable for bad faith damages, not just the stipulated damages.¹⁶⁹

In determining whether a bad faith breach occurred, the Eastern District relied on the definition that the obligor must have *intentionally and maliciously* failed to perform his obligation to be found in bad faith.¹⁷⁰ The Eastern District further stated that Louisiana Civil Code "article 1997 should not be construed *so broadly as to include such intentional, but not malicious, conduct.*"¹⁷¹ The district court explained that there needed to be evidence proving that the buyers' breach was in fact malicious or fraudulent rather than merely intentional.¹⁷² Otherwise, "[i]f the [c]ourt were to hold that by not seeking financing or putting up a down-payment, the party also violated the bad faith provision in the Civil Code, any breach of this common contractual provision would allow the seller to recover unforeseeable damages."¹⁷³ Even though the *Bodin II* court did not find that the buyers breached in bad faith, the *Bodin II* analysis indicates that if the buyers were found in bad faith, they would be liable for foreseeable and unforeseeable damages, not the agreed upon stipulated damages clause.¹⁷⁴

165. *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008).

166. *Id.* at *1.

167. *Id.*

168. *Id.* at *4.

169. *Id.*

170. *Bodin v. Butler*, No. 07-3505, 2008 BL 297876, at *4 (E.D. La. July 24, 2008); *Bodin*, 2008 WL 2951345, at *4; *Bodin v. Butler*, 338 F. App'x 448 (5th Cir. 2009).

171. *Bodin*, 2008 WL 2951345, at *4 (emphasis added).

172. *Id.*

173. *Id.*

174. *Id.*

C. United States Court of Appeals for the Fifth Circuit

On appeal, in *Bodin III*,¹⁷⁵ the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the Eastern District in *Bodin II*.¹⁷⁶ The appellate court acknowledged that bad faith must be analyzed because the extent of the breaching party's liability depended on whether the party breached the purchase agreement in bad faith.¹⁷⁷ Like the Eastern District, the United States Fifth Circuit relied on the bad faith definition that the obligor must have *intentionally and maliciously* failed to perform his obligation to be found in bad faith.¹⁷⁸ Because the sellers were unable to present any evidence regarding the buyers' bad faith or malicious intent, the court limited recovery to the stipulated damages clause.¹⁷⁹

D. Louisiana Fourth Circuit Court of Appeal

Like the United States Fifth Circuit's approach, the Louisiana Fourth Circuit Court of Appeal held that bad faith breaches expose obligors to bad faith damages even in the presence of a stipulated damages clause.¹⁸⁰ In *1100 South Jefferson Davis Parkway, LLC v. Williams*, a buyer and a seller entered into a real estate purchase agreement that contained a stipulated damages clause.¹⁸¹ In the event of a breach, the stipulated damages clause awarded the non-breaching party \$10,000.¹⁸² The buyer intentionally breached the contract due to issues with the property's flood elevation; however, the buyer failed to disclose his intent to walk away from the contract if the property did not meet certain flood requirements at the formation of the contract.¹⁸³

The seller argued that the buyer breached in bad faith; therefore, the seller may recover foreseeable and unforeseeable damages.¹⁸⁴ To determine whether the buyer breached in bad faith, the Fourth Circuit adopted the bad faith definition requiring that the obligor intentionally and

175. *Bodin*, 338 F. App'x 448.

176. *Id.* at 453.

177. *Id.*

178. *Id.* at 452.

179. *Id.* at 453.

180. *Id.*; *1100 S. Jefferson Davis Parkway, LLC v. Williams*, 165 So. 3d 1211, 1214 (La. Ct. App. 4th Cir. 2015).

181. *Williams*, 165 So. 3d at 1214.

182. *Id.*

183. *Id.* at 1217.

184. *Id.*

maliciously failed to perform his obligation.¹⁸⁵ The court further explained that bad faith “generally implies actual or constructive fraud or a refusal to fulfill contractual obligations, not an honest mistake as to actual rights or duties.”¹⁸⁶ The court did not find that the buyer’s breach amounted to a bad faith breach; however, the court noted that “if [buyer] acted in bad faith, he is liable for all of [seller’s] damages that resulted from his breach[,]” not just the stipulated damages.¹⁸⁷ Because the Fourth Circuit found that the intentional breach was not a bad faith breach, the buyer was only liable for \$10,000 in stipulated damages.¹⁸⁸

E. United States District Court for the Middle District of Louisiana

Similar to the United States Fifth Circuit and the Louisiana Fourth Circuit, the United States District Court for the Middle District of Louisiana, in *Wheeler v. Carber*, applied the same approach regarding the relationship between stipulated damages and bad faith breaches.¹⁸⁹ In *Wheeler*, there was a series of contracts to purchase and sell real estate.¹⁹⁰ The buyers hired two real estate agents to facilitate the purchase of twenty-four condominiums.¹⁹¹ The real estate agents allegedly induced the buyers to purchase an additional 30 condominiums by promising that the buyers would be able “to ‘flip’ the additional condominiums to a third party.”¹⁹² The third party failed to close on the deal, and, as a result, the buyers failed to purchase the condominiums.¹⁹³ Consequently, the seller brought a breach of contract claim against the buyers for a bad faith breach and demanded foreseeable and unforeseeable damages.¹⁹⁴ In response, the buyers moved for partial summary judgment, arguing that the damages were limited to those set forth in the stipulated damages clause.¹⁹⁵

The court denied the motion for partial summary judgment, finding that whether the buyers breached the purchase agreements in bad faith was “pregnant with fact” and central to the issue regarding whether the

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *See Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012).

190. *Id.* at *1.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at *2.

195. *Id.*

stipulated damages clauses applied.¹⁹⁶ If the buyers breached in bad faith, then the seller is entitled to all damages—foreseeable and unforeseeable.¹⁹⁷ Conversely, if the buyers did not breach in bad faith, then the seller may be limited to the stipulated damages of five percent of the purchase price.¹⁹⁸ Although the Middle District applied the same approach as the United States Court of Appeals for the Fifth Circuit in *Bodin III* and the Louisiana Fourth Circuit in *1100 South Jefferson*, the Middle District in *Wheeler* applied a different definition of bad faith.¹⁹⁹ Whereas the other courts found that bad faith required both intent and malice, the Middle District defined bad faith as an intentional *or* malicious failure to perform.²⁰⁰

III. CRITIQUE OF THE JURISPRUDENCE

As is likely apparent from the summaries above, ambiguity in the law, and inconsistency in its application, exists regarding stipulated damages.²⁰¹ All the aforementioned cases involve an intentional breach of a real estate purchase agreement with a stipulated damages clause.²⁰² The following critique identifies three major flaws in the jurisprudence. First, due to longstanding policy, a party breaching in bad faith cannot limit his or her liability to the agreed upon stipulated damages because it contradicts the principle of good faith.²⁰³ Second, the civilian definition of bad faith does not require malice.²⁰⁴ Lastly, Louisiana Civil Code article 2004 was

196. *Id.* at *6.

197. *Id.*

198. *Id.*

199. *Id.* at *2; *see Bodin v. Butler*, 338 F. App'x 448 (5th Cir. 2009); *1100 S. Jefferson Davis Parkway, LLC v. Williams*, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015).

200. *Wheeler*, 2012 WL 13001423, at *2; *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008); *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211.

201. *See Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x at 453; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994); *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994).

202. *See Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x at 453; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423.

203. *See* LA. CIV. CODE art. 2004 (2023); *see also id.* art. 1997.

204. Scalise, *supra* note 40, at 743; Litvinoff & Scalise § 5.8, *supra* note 28; CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804) (“Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat,

relevant and applicable in all the cases because each scenario involved an intentional breach.²⁰⁵

A. Policy Reasons Regarding the Relationship Between Stipulated Damages and Bad Faith Breaches

Louisiana law supports a broad freedom to contract, and every contract must be performed in good faith.²⁰⁶ As a consequence of breaching in bad faith, the breaching party should not be able to limit his or her liability through a stipulated damages clause.²⁰⁷ A party breaching in bad faith should always be liable for all foreseeable and unforeseeable damages that were a direct consequence of the failure to perform.²⁰⁸ The notion that a bad faith obligor is liable for foreseeable and unforeseeable damages despite a stipulated damages clause is supported by French and Roman law as well as other pertinent Louisiana Civil Code articles.²⁰⁹

The Louisiana Civil Code is heavily influenced by the French Civil Code.²¹⁰ Although French is no longer the language of the Louisiana Civil Code, Louisiana courts continue to look to the French versions of the Louisiana Civil Codes of 1808 and 1825 to better understand gaps in the law.²¹¹ Because of the Louisiana Civil Code's deep connection to French law, French doctrine still plays a fundamental role in the interpretation of the current code.²¹²

lorsque ce n'est point par son dol que l'obligation n'est point exécutée.”) [“A debtor is liable only for damages which were foreseen or which could have been foreseen at the time of the contract, where it is not through his own intentional breach that the obligation is not fulfilled.”]; LA. CIV. CODE art. 1934(1) (1870).

205. LA. CIV. CODE art. 2004 (2023). *See Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423.

206. LA. CIV. CODE art. 1983 (2023).

207. SAUL LITVINOFF & RONALD J. SCALISE JR., INTENTIONAL FAULT, GROSS FAULT, BAD FAITH, OR FRAUD, *in* LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS, *supra* note 26, § 13.22 [hereinafter Litvinoff & Scalise § 13.22].

208. *Id.*

209. Litvinoff & Scalise § 5.8, *supra* note 28 (citing CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804); LA. CIV. CODE art. 1934(1) (1870)); *see also* LA. CIV. CODE art. 2004 (2023).

210. Alain A. Levasseur & Roger K. Ward, *300 Years and Counting: The French Influence on the Louisiana Legal System*, 46 LA. BAR J. 301, 303 (1998).

211. *Id.*

212. *Id.*

Good faith is essential in determining the amount of damages owed to the injured party.²¹³ Recall that a good faith obligor is liable only for the damages that were foreseeable at the time the contract was made.²¹⁴ The principle of good faith dates back to Roman origin, and similar language is found in the Code Napoleon and earlier articles of the Louisiana Civil Code.²¹⁵ French doctrine provides that an obligor who fails to perform intentionally or in bad faith should not be allowed to invoke the benefit of the stipulated damages clause if the actual damages are more than those stipulated.²¹⁶ Rather, the intentional or bad faith obligor should be liable for the obligee's actual loss.²¹⁷

Furthermore, stipulated damages are an evaluation of possible damages that parties make in advance in the event that there is a failure to perform.²¹⁸ When evaluating the dollar amount laid out in a stipulated damages clause, parties attempt to anticipate any possible damages that they may encounter from a breach. By definition, these damages are foreseeable damages, as they can be foreseen at the time of contracting.²¹⁹ In contrast, parties will not be able to anticipate unforeseeable damages because, by their nature, these kinds of damages cannot be foreseen at the time of contracting.²²⁰ Because a bad faith obligor is liable for foreseeable and unforeseeable damages, he or she should not be able to limit his or her liability to the agreed upon stipulated damages because that would exclude unforeseeable damages.²²¹ That not only contradicts Louisiana Civil Code article 1997, but also contradicts the policy of good faith.²²² There is no discernable reason to allow an obligor to reap the benefits of a stipulated damages clause when the obligor breached in bad faith.

Since a bad faith obligor should be liable for foreseeable and unforeseeable damages despite a stipulated damages clause, the Louisiana Third Circuit in *Grimsley* erred in holding that a stipulated damages clause

213. LA. CIV. CODE. arts. 1996–97 (2023).

214. *Id.* art. 1996.

215. Litvinoff & Scalise § 5.8, *supra* note 28; CODE CIVIL [C. CIV.] art. 1104 (Fr.) (1804); LA. CIV. CODE art. 1934(1) (1870).

216. Litvinoff & Scalise § 13.22, *supra* note 207 (citing WEILL ET TERRÉ, DROIT CIVIL—LES OBLIGATIONS 532 (3d ed. 1980)).

217. *Id.* (citing WEILL ET TERRÉ, DROIT CIVIL—LES OBLIGATIONS 532 (3d ed. 1980)).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*; LA. CIV. CODE art. 1997 (2023).

was controlling when the party breached in bad faith.²²³ The *Grimsley* court acknowledged that the failure to disclose a student loan judgment against one of the buyers was a bad faith breach.²²⁴ However, the analysis fell short and did not explore the relationship between stipulated damages and bad faith breaches.²²⁵ After finding the buyer breached in bad faith, the *Grimsley* court should have delved into a discussion about the purpose of both stipulated damages and bad faith breaches and the longstanding principle of good faith.²²⁶ That discussion would have led the *Grimsley* court to conclude that a bad faith obligor should not be allowed to invoke the benefit of the stipulated damages clause; therefore, the buyers would have been liable for the \$15,000 in actual damages rather than the \$500 in stipulated damages.²²⁷

Additionally, the Eastern District in *Bodin I* erred when it concluded that an obligor's liability is limited to the stipulated damages clause, regardless of bad faith.²²⁸ However, the Eastern District vacated the part of its opinion that pertains to this issue.²²⁹ Therefore, the Eastern District acknowledged this mistake and corrected itself in *Bodin II* by noting that if the buyers were found in bad faith, they would be liable for bad faith damages, not just the stipulated damages.²³⁰

B. Defining Bad Faith

Now that it has been established that a bad faith obligor should be liable for foreseeable and unforeseeable damages regardless as to whether there is a stipulated damages clause in the contract, the next issue is to define *bad faith*. There is not a definition of bad faith in the Louisiana Civil Code.²³¹ As a result, there are inconsistencies among Louisiana courts and Louisiana doctrine regarding whether a bad faith breach

223. *Grimsley v. Lenox*, 643 So. 2d 203, 206 (La. Ct. App. 3d Cir. 1994).

224. *Id.*

225. *Id.*

226. Litvinoff & Scalise § 5.8, *supra* note 28; CODE CIVIL [C. CIV.] art. 1104 (Fr.) (1804); LA. CIV. CODE art. 1934(1) (1870).

227. *See generally Grimsley*, 643 So. 2d 203; *see* Litvinoff & Scalise § 13.22, *supra* note 207 (citing WEILL ET TERRÉ, DROIT CIVIL—LES OBLIGATIONS 532 (3d ed. 1980)).

228. *Bodin v. Butler*, No. 07-3505, 2008 BL 297876, at *6 (E.D. La. July 24, 2008).

229. *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345, at *1 (E.D. La. July 28, 2008).

230. *Id.* at *4.

231. *See generally* LA. CIV. CODE arts. 1906–2291 (2023).

requires both intent and malice or whether an intentional, but not malicious, breach is enough to satisfy bad faith.²³² The Eastern District of Louisiana, the U.S. Fifth Circuit, and the Louisiana Fourth Circuit Court of Appeal have held that a bad faith breach is defined as an *intentional and malicious breach*.²³³ However, the Middle District of Louisiana, along with civil law doctrine, define a bad faith breach as an intentional breach of a contract; malice is not required.²³⁴

1. *Bad Faith in the Louisiana Civil Code*

Disagreement amongst courts and doctrine regarding the definition of bad faith derives from the fact that the current Louisiana Civil Code does not include a definition.²³⁵ However, the Louisiana Civil Code of 1870 provided a definition of bad faith.²³⁶ Louisiana Civil Code article 1934(1) of 1870 provided: “By *bad faith* in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.”²³⁷

The Louisiana legislature repealed the article in 1985, and the various federal and state courts have looked to the comments of the Louisiana Civil Code to define bad faith.²³⁸ The comments in the Civil Code are drafted by the scholars of the Louisiana Law Institute and discussed throughout the legislative process.²³⁹ Therefore, the comments can be useful to help understand the law.²⁴⁰ With that said, it is well settled that

232. *Bodin*, 2008 BL 297876, at *4; *Bodin*, 2008 WL 2951345, at *4; *Bodin v. Butler*, 338 F. App’x 448, 452 (5th Cir. 2009); *1100 S. Jefferson Davis Parkway, LLC v. Williams*, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804); Scalise, *supra* note 40, at 743.

233. *See Bodin*, 2008 BL 297876, at *4; *Bodin*, 2008 WL 2951345, at *4; *Bodin*, 338 F. App’x at 452; *Williams*, 165 So. 3d at 1217.

234. *See Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012); Scalise, *supra* note 40, at 743; CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804).

235. *See generally* LA. CIV. CODE arts. 1906–2291 (2023).

236. LA. CIV. CODE art. 1934(1) (1870).

237. *Id.*

238. *See Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App’x 448; *Williams*, 165 So. 3d 121.

239. Melissa T. Lonegrass, *Hidden Law: Taking the Comments More Seriously*, 92 TUL. L. REV. 265, 290 (2017).

240. *Id.* at 269.

revision comments are not the law.²⁴¹ Despite their lack of binding authority, Louisiana courts heavily rely on the comments to Louisiana Civil Code article 1997 to inaccurately define bad faith.²⁴²

Comment (a) to Louisiana Civil Code article 1997 provides: “This Article is new. It does not change the law, however. It reproduces the substance of C.C. Art. 1934(2) (1870).”²⁴³ Louisiana Civil Code article 1934(2) of 1870 provided:

When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages can not exceed this.²⁴⁴

Comment (b) provides: “An obligor is in bad faith if he intentionally and maliciously fails to perform his obligation.”²⁴⁵ Comment (c) provides:

This Article uses the term “bad faith” rather than “fraud,” the term used in C.C. Art. 1934 (1870). The French version of that Article used *dol*, which is not exactly fraud. Moreover, the same term of art should not be used to designate two different things. In the context of vices of consent, “fraud” means a stratagem or machination to take unfair advantage of another party. “Bad faith” better conveys the intended meaning here, that is, an intentional *and* malicious failure to perform. This includes most of the meaning of the French *dol*. A truly fraudulent failure to perform of course, would constitute bad faith under this Article.²⁴⁶

Although comment (a) suggests that article 1997 does not change the previous law, the adoption of comment (b) and comment (c) drastically changed how courts interpret a good faith and bad faith breach of contract

241. *Id.* at 266; Andre Mayer Stoler, *Finding the Fault Lines: An Epistemological Inquiry of the True Meaning of Civil Law “Fault”*, 67 LOY. L. REV. 255, 278 (2020).

242. *Bodin*, 2008 WL 2951345, at *4; *Bodin*, 338 F. App’x at 452; *Williams*, 165 So. 3d at 1220; *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423, at *6 (M.D. La. Mar. 27, 2012).

243. LA. CIV. CODE ANN. art. 1997 cmt. a (2021).

244. LA. CIV. CODE art. 1934(2) (1870).

245. LA. CIV. CODE ANN. art. 1997 cmt. b (2021).

246. *Id.*

to determine the quantum of damages.²⁴⁷ These comments define bad faith to require two elements: intent *and* malice.²⁴⁸ Before its repeal, Louisiana Civil Code article 1934(1) of 1870 defined bad faith as “a designed breach of [the contract caused by] some motive of interest or ill will.”²⁴⁹ The language of the previous law includes a disjunctive *or*.²⁵⁰ This language supported the view that intent or malice is required, but not both.²⁵¹

2. *The Civilian Law Defining Bad Faith*

In addition to analyzing Louisiana Civil Code article 1934(1), comment (c) mentions the French term *dol*, so it is beneficial to understand the origin of the French term.²⁵² The meaning of the French *dol* does not require an intentional *and* malicious failure to perform.²⁵³ Charles Toullier, an early French commentator, explained that fraud occurs when the parties fail to execute their obligations out of a design to harm the other, whereas bad faith occurs when the obligor fails to fulfill his engagements without a specific intent to harm the obligee.²⁵⁴ French law and jurisprudence support Toullier’s view that *dol* includes an intentional breach of a contract even if the breaching party does not intend to harm the other party.²⁵⁵

Article 1151 of the French Civil Code of 1804 provided:

Dans le cas même où l'inexécution de la convention résulte du *dol* du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé que ce qui est une suite immédiate et directe de l'inexécution de la convention.²⁵⁶

Article 1151 of the French Civil Code of 1804 includes the French *dol* and translates to:

247. Stolier, *supra* note 241, at 278; *see* LA. CIV. CODE ANN. art. 1997 cmt. b (2021); *id.* art. 1997 cmt. c.

248. *See* LA. CIV. CODE ANN. art. 1997 cmt. b (2021); *see id.* art. 1997 cmt. c.

249. LA. CIV. CODE art. 1934(1) (1870).

250. Stolier, *supra* note 241, at 281.

251. *Id.*

252. LA. CIV. CODE ANN. art. 1997 cmt. c (2021).

253. Scalise, *supra* note 40, at 743.

254. *Id.*

255. *Id.* (citing DENIS TALLON, REMEDIES: FRENCH REPORT, IN CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 276–77 (Donald Harris & Denis Tallon eds. 1989)).

256. CODE CIVIL [C. CIV.] art. 1151 (Fr.) (1804) (emphasis added).

Even in the case where the non-performance of the agreement is due to the debtor's *intentional breach*, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an immediate and direct consequence of the non-performance of the agreement.²⁵⁷

Compare article 1151 of the French Civil Code of 1804 to Louisiana Civil Code article 1997.²⁵⁸ “An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.”²⁵⁹ Although worded differently, the effects of the two articles are similar—an obligor in bad faith or *dol* is liable for those damages that are a direct consequence of the obligor's failure to perform.²⁶⁰ Article 1151 translates “*dol du débiteur*” to read “the debtor's intentional breach.”²⁶¹

For that reason, comment (c) to Louisiana Civil Code article 1997 is incorrect in providing that bad faith is best conveyed as the intentional and malicious failure to perform.²⁶² An intentional and malicious failure to perform is included in *dol*; however, an intentional breach even without malice is also included in *dol*.²⁶³ Therefore, comment (b) to Louisiana Civil Code article 1997 is not erroneous in stating, “An obligor is in bad faith if he intentionally and maliciously fails to perform his obligation”; however, it has led to confusion because comment (b) and comment (c) do not make it explicit that an intentional, but not malicious, breach is also a bad faith breach.²⁶⁴

3. Real Life Application of the Law

Now, it has been established that (1) a bad faith obligor should be liable for foreseeable and unforeseeable damages regardless as to whether there is a stipulated damages clause in the contract; and (2) an intentional, but not malicious, breach is also a bad faith breach. Recall the hypothetical above: Buyer intentionally breached the contract because Buyer no longer wanted the house. Seller sued Buyer for \$50,000 in foreseeable and unforeseeable damages. Buyer argued that his liability was limited to the \$10,000 in stipulated damages.

257. *Id.* (emphasis added).

258. *See id.*; *see* LA. CIV. CODE art. 1997 (2023).

259. LA. CIV. CODE art. 1997 (2023).

260. *See id.*; CODE CIVIL [C. CIV.] art. 1151 (Fr.) (1804) (emphasis added).

261. CODE CIVIL [C. CIV.] art. 1151 (Fr.) (1804).

262. LA. CIV. CODE ANN. art. 1997 cmts. b–c (2021).

263. *Id.*; CODE CIVIL [C. CIV.] art. 1151 (Fr.) (1804).

264. LA. CIV. CODE ANN. art. 1997 cmt. b (2021).

When these facts are tried, the analysis should be as follows. The Louisiana Civil Code does not define bad faith; therefore, the Court must look to the relevant laws and doctrine to ascertain the intended definition of bad faith. In analyzing Louisiana Civil Code Article 1997 and comment (c) to the article, the term *bad faith* is adopted from the French *dol*.²⁶⁵ *Dol* was expressed in article 1151 of the French Civil Code of 1804, and *dol* translated to *intentional breach*.²⁶⁶ There is no mention of a malice requirement in the civilian law.²⁶⁷ Therefore, an intentional breach of a contract is a bad faith breach—malice is not required. As a result, Buyer breached in bad faith when Buyer intentionally breached the purchase agreement.

Since a bad faith breach occurred, the next issue is whether Buyer is liable for the stipulated damages or the foreseeable and unforeseeable damages. To understand the relationship between stipulated damages and foreseeable and unforeseeable damages, it must be acknowledged that good faith is a longstanding principle practiced in Louisiana.²⁶⁸ Relying on the current Louisiana law, a party breaching in good faith is liable for only foreseeable damages, and a party breaching in bad faith is liable for all foreseeable and unforeseeable damages that were a direct consequence of the failure to perform.²⁶⁹ Because stipulated damages are an evaluation of possible damages that parties make at the formation of the contract, these damages are foreseeable damages.²⁷⁰ Stipulated damages cannot include unforeseeable damages because parties will not be able to anticipate these kinds of damages at the time of contracting. The current Louisiana laws and the principles of good faith lead to the conclusion that a bad faith obligor should not be able to limit his or her liability to the agreed upon stipulated damages.²⁷¹ Therefore, Buyer is liable for the \$50,000 in foreseeable and unforeseeable damages rather than the agreed upon \$10,000 in stipulated damages.

265. *Id.* art. 1997 cmt. c; LA CIV. CODE art. 1997 (2023).

266. CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804).

267. *Id.*; Scalise, *supra* note 40, at 743.

268. Litvinoff & Scalise § 5.8, *supra* note 28; CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804); LA. CIV. CODE art. 1934(1) (1870); *see* LA. CIV. CODE art. 1997 (2023).

269. LA. CIV. CODE arts. 1996–97 (2023).

270. Litvinoff & Scalise § 5.8, *supra* note 28.

271. LA. CIV. CODE art. 1997 (2023); Litvinoff & Scalise § 5.8, *supra* note 28.

C. Failure to Apply Relevant Louisiana Law

The final critique of these cases is the same critique argued after summarizing the two Louisiana Supreme Court opinions, *Heirs of Gremillion* and *Lombardo*.²⁷² Recall that Louisiana Civil Code article 2004 states that an intentional breach of a contract nullifies a stipulated damages clause.²⁷³ Because all the cases discussed above involved a buyer intentionally breaching an agreement that contained a stipulated damages clause, Louisiana Civil Code article 2004 was relevant and applicable to each case.²⁷⁴ Under current Louisiana law, the Louisiana Third Circuit, the Eastern District of Louisiana, and the Middle District of Louisiana should have included Louisiana Civil Code article 2004 in their analyses and concluded that the intentional breaches nullified the stipulated damages clauses.²⁷⁵ Then, the courts needed to determine the liability of the breaching party.²⁷⁶ As demonstrated above, the courts should have looked to relevant laws and doctrine to ascertain the intended definition of bad faith and concluded that an intentional breach is a bad faith breach.²⁷⁷ Therefore, the intentionally breaching party is liable for foreseeable and unforeseeable damages, not the stipulated damages clause.

Unlike the Louisiana Third Circuit, the Eastern District of Louisiana, and the Middle District of Louisiana, the U.S. Fifth Circuit and Louisiana Fourth Circuit briefly addressed and ultimately rejected Louisiana Civil Code article 2004.²⁷⁸ In *1100 South Jefferson*, the sellers argued that pursuant to Louisiana Civil Code article 2004, gross fault includes “not

272. See *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994).

273. LA. CIV. CODE art. 2004 (2023).

274. *Id.*; see *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008); *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin v. Butler*, 338 F. App'x 448 (5th Cir. 2009); *1100 S. Jefferson Davis Parkway, LLC v. Williams*, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012).

275. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Wheeler*, 2012 WL 13001423; *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994).

276. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203.

277. Scalise, *supra* note 40, at 742; Litvinoff & Scalise § 5.8, *supra* note 28; CODE CIVIL [C. CIV.] art. 1150 (Fr.) (1804); LA. CIV. CODE art. 1934(1) (1870); see LA. CIV. CODE art. 1997 (2023).

278. *Bodin*, 338 F. App'x at 452; *Williams*, 165 So. 3d at 1219 n.9; *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203.

only gross negligence, but also bad faith breach of contract or fraud.”²⁷⁹ Therefore, according to the seller, the buyer’s bad faith breach nullified the stipulated damages clause.²⁸⁰

In its footnotes, the Fourth Circuit briefly addressed this argument and rejected article 2004’s application.²⁸¹ First, the *1110 South Jefferson* court expressed that the stipulated damages clause was not a waiver, and it did not attempt to limit the liability of the breaching party for intentional or gross fault.²⁸² Furthermore, the court noted that even if it had found gross fault, the contractual provision did not rise to a level in violation of Louisiana Civil Code article 2004.²⁸³ Lastly, the court analyzed the statutory construction of Louisiana Civil Code article 2004 and Louisiana Civil Code article 2012.²⁸⁴ Recall that Louisiana Civil Code article 2012 provides that the courts cannot modify stipulated damages “unless they are so manifestly unreasonable as to be contrary to public policy.”²⁸⁵ The Fourth Circuit explained that Louisiana Civil Code article 2012 must be applied over Louisiana Civil Code article 2004.²⁸⁶

The Fourth Circuit’s reasoning is flawed.²⁸⁷ For Louisiana Civil Code article 2004 to apply, the clause does not have to be a waiver.²⁸⁸ The clause in *1110 South Jefferson* limited the breaching party’s liability at the formation of the contract.²⁸⁹ Therefore, when the buyer intentionally breached the purchase agreement, Louisiana Civil Code article 2004 became relevant. Additionally, the Fourth Circuit stated that the contractual provision did not rise to a level in violation of Louisiana Civil Code article 2004 but did not further explain what would “rise to the level” to violate article 2004.²⁹⁰ Finally, the statutory construction reasoning is flawed because Louisiana Civil Code article 2004 and Louisiana Civil Code article 2012 have two distinct effects.²⁹¹ On the one hand, Louisiana Civil Code article 2004 nullifies a stipulated damages clause due to the

279. *Williams*, 165 So. 3d at 1219 n.9.

280. *See id.*

281. *See id.*

282. *See id.*

283. *See id.*

284. *See id.*

285. LA. CIV. CODE art. 2012 (2023).

286. *Williams*, 165 So. 3d at 1219 n.9.

287. *See id.*

288. *See* LA. CIV. CODE art. 2004 (2023).

289. *See Williams*, 165 So. 3d at 1219 n.9.

290. *See id.*

291. LA. CIV. CODE arts. 2004, 2012 (2023).

obligor's intentional or gross fault.²⁹² On the other hand, Louisiana Civil Code article 2012 does not nullify a stipulated damages clause; rather, it allows the courts to modify stipulated damages clauses that are manifestly unreasonable.²⁹³ Therefore, the Fourth Circuit did not provide adequate reasons to reject the Louisiana Civil Code article 2004 argument.²⁹⁴

In *Bodin III*, the sellers relied on Louisiana Civil Code article 2004 and argued that they did not need to prove bad faith as a matter of law, only intentional conduct.²⁹⁵ The sellers argued that the intentional breach of the purchase agreement nullified the stipulated damages clause under article 2004.²⁹⁶ The U.S. Fifth Circuit disagreed, instead finding that article 2004 only refers to fraudulent intent.²⁹⁷ The court explained that if article 2004 “lowered the level of conduct necessary to invalidate a stipulated damages clause to only intentional conduct, there would be no need for [a]rticle 1997.”²⁹⁸ Allowing article 2004 to include only intentional conduct contradicts the comments to article 1997 which provide that “[a]n obligor is in bad faith if he intentionally and maliciously fails to perform his obligation.”²⁹⁹ Moreover, the U.S. Fifth Circuit noted that the sellers’ interpretation of article 2004 would “preclude even earnest money clauses because a buyer can intentionally decide to recede from a transaction and will only be liable for the amount of the earnest money.”³⁰⁰

Similarly to the Fourth Circuit, the U.S. Fifth Circuit’s reasoning is flawed for a few reasons.³⁰¹ First, the U.S. Fifth Circuit stated that article 1997 would be superfluous if article 2004 invalidated stipulated damages clause for only intentional conduct.³⁰² Recall that the exact language of Louisiana Civil Code article 2004 provides, “Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.”³⁰³ Louisiana Civil Code article 2004 only nullifies the stipulated damages clause; it does not address what the breaching party should be liable for.³⁰⁴ Louisiana law recognizes

292. *Id.* art. 2004.

293. *Id.* art. 2012.

294. *See Williams*, 165 So. 3d at 1219 n.9.

295. *Bodin v. Butler*, 338 F. App’x 448, 452 (5th Cir. 2009).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* (citing LA. CIV. CODE ANN. art. 1997 cmt. b (1984)).

300. *Id.*

301. *See id.*

302. *Id.*

303. LA. CIV. CODE art. 2004 (2023).

304. *See id.*

several types of damages.³⁰⁵ Therefore, whenever Louisiana Civil Code article 2004 is applicable, the next step of the analysis is to determine the extent of liability the breaching party owes to the non-breaching party. As explained above, an intentional breach is a bad faith breach, so Louisiana Civil Code article 1997 is necessary to establish that a party breaching in bad faith is liable for foreseeable and unforeseeable damages.³⁰⁶ Therefore, the U.S. Fifth Circuit's reasoning is flawed because Louisiana Civil Code article 1997 is not superfluous; rather, article 1997 supplements article 2004.³⁰⁷

Second, the U.S. Fifth Circuit reasoned that this interpretation of article 2004 contradicts the comments to article 1997 because the comments define bad faith as an intentional and malicious failure to perform.³⁰⁸ However, this argument is erroneous because the comments to article 1997 are erroneous. Bad faith is derived from the French *dol*, and the proper translation of *dol* does not require malice.³⁰⁹

Lastly, U.S. Fifth Circuit noted that the sellers' interpretation of article 2004 would preclude the concept of earnest money.³¹⁰ Recall that according to Louisiana Civil Code article 2624, earnest money allows either party to intentionally recede from the contract, and the breaching party's liability is limited to the agreed upon sum.³¹¹ If the buyer breaches, the buyer forfeits the earnest money, whereas if the seller breaches, the seller must return the earnest money plus an equal amount.³¹² Louisiana Civil Code article 2624 is found in Book III, Title VII, Section 2, titled "Contract to Sell," whereas Louisiana Civil Code article 2004 is found in Book III, Title IV, Section 4, titled "Damages."³¹³ According to the general rules of statutory construction, "where two or more statutes deal with the same subject matter, the statute more specifically directed to the matter at issue must prevail over a statute more general in character if they cannot be reconciled."³¹⁴ The placement of earnest money in the Code is

305. See generally *id.* arts. 1989–2012.

306. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1150 (Fr.) (1804); LA. CIV. CODE art. 1934(1) (1870); LA. CIV. CODE art. 1997 (2023).

307. See *Bodin*, 338 F. App'x at 452.

308. *Id.*

309. LA. CIV. CODE ANN. art. 1997 cmt. c (2021); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1150 (Fr.) (1804).

310. *Bodin*, 338 F. App'x at 452.

311. LA. CIV. CODE art. 2624 (2023).

312. *Id.*

313. *Id.* arts. 1906–2291, 2623–24,

314. 1100 S. Jefferson Davis Parkway, LLC v. Williams, 165 So. 3d 1211, 1211 (La. Ct. App. 4th Cir. 2015).

significant because when earnest money is applicable, it is an exception to the general rule. The legislature expressly allows parties to intentionally breach a real estate purchase agreement and limit their liability to earnest money.³¹⁵ Therefore, the buyers had the option to agree to earnest money, and then their liability would have been limited to the agreed upon amount.³¹⁶ However, the legislature has not expressly allowed parties to intentionally breach a real estate purchase agreement and limit their liability to stipulated damages. Thus, the legislature would need to enact a provision in Book III, Title VII, Section 2 to support this concept.

IV. SUPPORT FOR THE POLICY OUTCOME OF THE JURISPRUDENCE

As explained, Louisiana law does not support the holdings that these courts previously reached.³¹⁷ The various courts have side-stepped critical analyses to find that the breaching party's liability was limited to the stipulated damages clause.³¹⁸ It is not enough to accept that all these opinions are incorrect. Limiting a buyer's liability to the agreed upon stipulated damages when the buyer intentionally breaches is a reasonable outcome from a policy perspective. However, the opinions do not explicitly address the policy reasons.³¹⁹

The Louisiana Supreme Court and the Eastern District of Louisiana mentioned the policy concerns regarding the usefulness of stipulated damages.³²⁰ The Louisiana Supreme Court emphasized that the redactors and legislators intended to make stipulated damages more *useful and predictable* in the 1984 revision.³²¹ The Eastern District further explained that stipulated damages clauses are useful because they generally

315. LA. CIV. CODE art. 2624 (2023).

316. See *Bodin v. Butler*, 338 F. App'x 448, 449 (5th Cir. 2009); LA. CIV. CODE art. 2624 (2023).

317. See LA. CIV. CODE art. 2004 (2023).

318. See *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008); *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012); *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994); *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994); *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); LA. CIV. CODE art. 2004 (2023).

319. See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 43 So. 2d 203; *Lombardo*, 647 So. 2d 1086; *Heirs of Gremillion*, 493 So. 2d 584; LA. CIV. CODE art. 2004 (2023).

320. *Lombardo*, 647 So. 2d at 1091; *Bodin*, 2008 BL 297876, at *6.

321. *Lombardo*, 647 So. 2d at 1091.

discourage litigation and expressed that if bad faith nullified a stipulated damages clause, stipulated damages clauses would lose much of their usefulness.³²² The Louisiana Supreme Court and the Eastern District looked into the origin and legislative history of stipulated damages; however, the courts failed to look into the origin and legislative history of Louisiana Civil Code article 1997 damages, which was pertinent to the discussion.³²³

As explained, the courts should have concluded that a bad faith obligor cannot limit his or her liability to the agreed upon stipulated damages because that contradicts not only Louisiana Civil Code articles 1997 and 2004 but also the policy of good faith.³²⁴ Although Louisiana should recognize an intentional, but not malicious, breach as a bad faith breach for all general conventional obligation claims, an exception needs to be made in the real estate realm. Rather than focusing on the usefulness of stipulated damages in regard to litigation, the Louisiana Supreme Court and the Eastern District should have focused on the usefulness of stipulated damages in a real estate purchase agreement and the effect on the economy.³²⁵

Recall the hypothetical above: Buyer intentionally breached the contract because Buyer no longer wanted to buy the house from Seller. Buyer assumed that his liability was limited to the \$10,000 in stipulated damages. If Buyer was held liable for the \$50,000 in foreseeable and unforeseeable damages, Buyer would be less likely to enter into another real estate purchase agreement in the future.

Therefore, the conclusion reached—a buyer's liability is limited to the agreed upon stipulated damages despite an intentional breach—is a reasonable conclusion from a policy perspective. The courts do not want to negatively impact the real estate market. Uncertainty, whether economic or political, negatively affects the real estate market.³²⁶ Moreover,

322. *Bodin*, 2008 BL 297876, at *6.

323. *See Lombardo*, 647 So. 2d at 1091; *Bodin*, 2008 BL 297876, at *6.

324. LA. CIV. CODE arts. 1997, 2004 (2023); Scalise, *supra* note 40, at 743; Litvinoff & Scalise § 5.8, *supra* note 28.

325. *See Lombardo*, 647 So. 2d at 1091; *Bodin*, 2008 BL 297876, at *6.

326. The United States experienced a decline in the real estate market during the housing and financial crisis that began in 2007, and it experienced a decline again during the beginning of the COVID-19 pandemic in 2020. Heightened unemployment and economic uncertainty negatively impact the real estate market. *See* Charles S. Gascon & Jacob Haas, *The Impact of COVID-19 on the Residential Real Estate Market*, FED. RSRV. BANK OF ST. LOUIS (Oct. 6, 2020), <https://www.stlouisfed.org/publications/regional-economist/fourth-quarter-2020/impact-covid-residential-real-estate-market> [<https://perma.cc/9K2G-ETH2>].

uncertainty regarding whether a court will enforce an agreed upon stipulated damages clause will also negatively affect the real estate market.

A. Common Law Approach

Although Louisiana jurisprudence does not expressly address the policy concerns regarding stipulated damages in the real estate realm, a common law court has addressed these interests.³²⁷ The facts in *Mahoney v. Tingley* are similar to previously discussed cases.³²⁸ In *Mahoney*, the buyer and the seller entered into a real estate purchase agreement with a liquidated damages clause,³²⁹ which read: “If title is so insurable and purchaser fails or refuses to complete purchase, the earnest money³³⁰ shall be forfeited as liquidated damages unless seller elects to enforce this agreement.”³³¹ The buyer intentionally breached the purchase agreement, and the seller demanded damages exceeding the stipulated sum in the

327. See *Bodin*, 2008 BL 297876; *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin v. Butler*, 338 F. App’x 448 (5th Cir. 2009); 1100 S. Jefferson Davis Parkway, LLC v. Williams, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012); *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994); *Lombardo*, 647 So. 2d 1086; *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986); *Mahoney v. Tingley*, 529 P.2d 1068 (Wash. 1975).

328. *Mahoney*, 529 P.2d 1068.

329. In common law, *liquidated damages* are synonymous with Louisiana’s *stipulated damages*. See *id.* at 1069.

330. In the common law, *earnest money* is treated the same as Louisiana’s *stipulated damages* because both clauses allow for the non-breaching party to demand either specific performance or dissolution where the agreed upon damages substitute for the performance of the obligation. Recall, in Louisiana, there are stipulated damages and earnest money. Unlike stipulated damages clauses, in Louisiana, earnest money negates the availability of specific performance. Therefore, when earnest money is paid, either party can recede from the contract without concern that the other party will seek its enforcement; the party who recedes simply forfeits the earnest money (in the case of the buyer) or pays an amount equal to the earnest money (in the case of the seller). In common law, there is no specific remedy that negates the availability of specific performance. Therefore, common law’s earnest money is different than Louisiana’s earnest money. See LA. CIV. CODE art. 2624 (2023); see also *Mahoney*, 529 P.2d at 1069.

331. *Mahoney*, 529 P.2d at 1069.

liquidated damages clause.³³² The *Mahoney* Court denied the seller's demand and limited recovery to the damages stipulated.³³³

In its opinion, the *Mahoney* Court explained that liquidated damages clauses will generally be upheld unless it can be proven that the clauses are either a penalty or unlawful.³³⁴ The Court explained that case law is not the only reason for such a holding; there are practical considerations as well.³³⁵ The argument focused on the certainty of the liquidated damages clauses and emphasized the buyer's and seller's expectations.³³⁶ The *Mahoney* Court's policy reason explained that liquidated damages are expected to be certain; the seller expects to receive the liquidated damages in the event of a breach, and the buyer expects to pay only the liquidated damages agreed upon in the event of a breach.³³⁷ If a seller wants more protection, then the seller "can simply demand more protection—a larger deposit of earnest money—or even dispense with a liquidated damages provision altogether."³³⁸ Parties that agree to a liquidated damages clause, "with its attendant features of certainty and reliance upon the limitation," cannot avoid the effect of that clause.³³⁹ However, the *Mahoney* Court acknowledged that this general rule does not apply in extraordinary circumstances such as fraud or serious overreaching by the buyer.³⁴⁰

Therefore, there are good policy reasons for allowing a buyer to walk away from a real estate purchase agreement and only pay the agreed upon stipulated damages.³⁴¹ It would positively impact the real estate market because it would meet the expectations of the parties.³⁴² In the event of a breach, the seller expects to receive the agreed upon stipulated damages, and the buyer expects to pay only the agreed upon stipulated damages.³⁴³ However, currently in Louisiana, the law does not clearly allow for a buyer to walk away from a real estate purchase agreement and only pay the agreed upon stipulated damages. Although there are other concepts in the Louisiana Civil Code, such as earnest money, that allow parties to intentionally breach a contract and limit their liability to agreed-upon

332. *Id.*

333. *Id.* at 1070–71.

334. *Id.* at 1071.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *See id.*

342. *See id.*

343. *See id.*

damages, a provision that provides a similar avenue for stipulated damages does not currently exist.³⁴⁴ As a result, the legislature should enact a new article in the Louisiana Civil Code to address this issue.

V. PROPOSALS

The following proposals aim to clarify the confusion in the law regarding stipulated damages. It is apparent that Louisiana Supreme Court, the Louisiana Third Circuit, the Eastern District of Louisiana, the U.S. Fifth Circuit, the Louisiana Fourth Circuit, and the Middle District of Louisiana believe that a party should be able to intentionally breach a real estate purchase agreement, and the breaching party's liability should be limited to the agreed upon stipulated damages.³⁴⁵ Although their holdings reach a reasonable outcome, Louisiana law does not support these findings.³⁴⁶ Therefore, these proposals would provide courts with relevant, binding law to support their conclusions and also positively impact the real estate market by eliminating the uncertainty in the law.

A. Enacting a New Article in the Sales Title of the Code

As mentioned earlier, the general damages of conventional obligations apply to purchase agreements.³⁴⁷ However, there is a different title of the Code that sets forth damages for contracts to sell property.³⁴⁸ It appears that the courts treat breaches of purchase agreements differently than other

344. LA. CIV. CODE art. 2624 (2023).

345. See *Bodin v. Butler*, No. 07-3505, 2008 BL 297876 (E.D. La. July 24, 2008); *Bodin v. Butler*, No. CIV.A. 07-3505, 2008 WL 2951345 (E.D. La. July 28, 2008); *Bodin v. Butler*, 338 F. App'x 448 (5th Cir. 2009); 1100 S. Jefferson Davis Parkway, LLC v. Williams, 165 So. 3d 1211 (La. Ct. App. 4th Cir. 2015); *Wheeler v. Carber*, No. CV 08-34, 2012 WL 13001423 (M.D. La. Mar. 27, 2012); *Grimsley v. Lenox*, 643 So. 2d 203 (La. Ct. App. 3d Cir. 1994); *Lombardo v. Deshotel*, 647 So. 2d 1086 (La. 1994); *Heirs of Gremillion v. Rapides Par. Police Jury*, 493 So. 2d 584 (La. 1986).

346. LA. CIV. CODE art. 2004 (2023). See *Bodin*, 2008 BL 297876; *Bodin*, 2008 WL 2951345; *Bodin*, 338 F. App'x 448; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203; *Lombardo*, 647 So. 2d 1086; *Heirs of Gremillion*, 493 So. 2d 584.

347. A real estate purchase agreement is a contract to sell. A contract to sell is a nominate contract, subject to general rules of conventional obligations. LA. CIV. CODE arts. 1914, 1915, 2005 (2023).

348. *Id.* arts. 2623–24.

conventional obligations.³⁴⁹ The courts appear to be more lenient with breaches of purchase agreements. An example of this leniency is earnest money.³⁵⁰ Earnest money allows either party to intentionally recede from the contract, despite article 2004 restricting this type of stipulation at the formation of the contract.³⁵¹ As clarified above, earnest money is found in the Sales title of the Code rather than general Conventional Obligations title of the Code.³⁵² The statutory placement of earnest money indicates that earnest money is an exception to the general rule of article 2004.

The reason courts are lenient with breaches of purchase agreements is that real estate is a crucial part of the economy, and there needs to be certainty in the law to promote the real estate market. Since uncertainty in politics and economics negatively affects the market, it is important that the law is clear and does not hinder real estate purchases.³⁵³ As the common law Court in *Mahoney* explained, sellers expect to receive the liquidated damages in the event of a breach, and buyers expect to pay only the liquidated damages agreed upon in the event of a breach.³⁵⁴ Agreeing to purchase a house is a big commitment. Therefore, if the law requires the buyer to be liable for foreseeable and unforeseeable damages simply because the buyer changed his mind, then the buyer would most likely not enter into a real estate purchase agreement. It is important for the buyers to know the extent of their liability at the formation of the contract in order for this market to succeed. However, this application of the rule—that intentional breaches are not bad faith breaches—should only apply to real estate contracts due to the public policy reasons explained. In other aspects of contract law, intentional breaches are bad faith breaches.

Therefore, the law could reflect these expectations in the Louisiana Civil Code, specifically in the Sales title of the Code. The Louisiana legislature should enact the following article to express this notion:

2624.1 Stipulated Damages

Parties may stipulate the damages to be recovered in case of nonperformance, defective performance, or delay in performance of an obligation arising from a contract to sell.

349. See *Bodin*, 2008 WL 2951345; *Williams*, 165 So. 3d 1211; *Wheeler*, 2012 WL 13001423; *Grimsley*, 643 So. 2d 203; *Lombardo*, 647 So. 2d 1086.

350. LA. CIV. CODE art. 2624 (2023).

351. *Id.* arts. 2004, 2624.

352. *Id.* arts. 1906–2291, 2623–24.

353. Gascon & Haas, *supra* note 326.

354. *Mahoney v. Tingley*, 529 P.2d 1068, 1071 (1975).

When a party intentionally fails to perform a contract to sell, that party will only be liable for the stipulated damages agreed upon at the formation of the contract.

However, a party may not be limited to the stipulated damages in the contract to sell if the failure to perform was due to fraud.

The last sentence of proposed article 2624.1 enforces the concept that bad faith damages are controlling despite the presence of a stipulated damage in the event that the breaching party committed fraud. Similarly, the common law Court noted that this general rule to uphold stipulated damages clauses does not apply in extraordinary circumstances such as fraud or serious overreaching by the buyer.³⁵⁵ An early commentator on the Code Napoleon made a distinction between bad faith and fraud:

[A]n obligor commits fraud when he fails to perform out of a design to cause harm to the obligee, while he is in bad faith when, without a design to cause harm, he fails to perform in order to secure a greater advantage for himself that he could achieve by performing, as when a party to a contract fails to render performance of his obligation to the other because he has entered into another and more advantageous contract with a third party, or when a party neglects the affairs of another, of which he was in charge, in order to take better care of his own.³⁵⁶

Therefore, the law should allow for intentional breaches in the real estate realm because the law should encourage a buyer to enter into agreements without subjecting himself to foreseeable and unforeseeable damages in the event the buyer decides that he does not want the house. However, if the obligor breached the purchase agreement to cause harm to the other party, then the obligor should not be able to reap the benefits of the stipulated damages clause because that would defy the principle of good faith.

By enacting this article, the legislature is adding a stipulated damages provision under the Sales title of the Code since there is currently not a stipulated damages provision under that title. This article will be beneficial to distinguish how stipulated damages should be treated for contracts to sell because the jurisprudence suggests that real estate agreements are treated differently than conventional obligations. However, the legislature

355. *Id.*

356. SAUL LITVINOFF & RONALD J. SCALISE JR., *BAD FAITH AND DAMAGES*, in 6 LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS § 5.20 (2d ed. 2020).

should also add comment (a) to Louisiana Civil Code article 2624.1. Comment (a) should provide:

Although an intentional breach typically nullifies a stipulated damages clause pursuant to Louisiana Civil Code article 2004, this is an exception to the general rule. Louisiana Civil Code article 2004 does not preclude this Article.

Adopting this new article to the Sales title of the Code with comment (a) addresses the issues that courts face and clarifies the law to promote certainty in the real estate market.

B. Amending Comments to Louisiana Civil Code Article 1997

In addition to enacting Louisiana Civil Code article 2624.1 and comment (a) to Louisiana Civil Code article 2624.1, the legislature should consider revising comment (c) to Louisiana Civil Code article 1997. While scholars have proposed eliminating comments (b) and (c) to Louisiana Civil Code article 1997 altogether,³⁵⁷ a revision to comments (c) would resolve this confusion by providing a better and more accurate definition of bad faith.

Comment (c) provides: “‘Bad faith’ better conveys the intended meaning here, that is, an intentional and malicious failure to perform. This includes most of the meaning of the French *dol*.”³⁵⁸ In light of the French from which the Louisiana Civil Code originated, the comment should be amended to better represent French law.³⁵⁹ French law and jurisprudence support the view that *dol* includes an intentional breach of a contract even if the breaching party does not intend to harm the other party.³⁶⁰ Therefore, the legislature could amend comment (c) to read:

This Article uses the term “bad faith” rather than “fraud,” the term used in C.C. Art. 1934 (1870). The French version of that Article used *dol*, which is not exactly fraud. Moreover, the same term of art should not be used to designate two different things. In the context of vices of consent, “fraud” means a stratagem or machination to take unfair advantage of another party. “*Bad faith*” includes an intentional breach of a contract even if the

357. Stolier, *supra* note 241, at 279.

358. LA. CIV. CODE ANN. art. 1997 cmt. c (2021).

359. Levasseur & Ward, *supra* note 210, at 303; Scalise, *supra* note 40, at 743 (citing TALLON, *supra* note 255, at 276–77).

360. Scalise, *supra* note 40, at 743 (citing TALLON, *supra* note 255, at 276–77).

breaching party does not intend to harm the other party. A truly fraudulent failure to perform of course, would constitute bad faith under this Article.

By revising comment (c), comment (b) to Louisiana Civil Code article 1997 would not need to be revised. Comment (b) currently reads: “An obligor is in bad faith if he intentionally and maliciously fails to perform his obligation.”³⁶¹ Therefore, comment (b) is correct because a bad faith breach includes intent and malice; however, comment (c) would clarify that there can be a bad faith breach even without intent and malice. Although these revisions are crucial to clarify the law, amending a comment is difficult.³⁶² After a comment is published, it is rarely amended.³⁶³ Even if the corresponding article is later amended, the comments generally remain in their original state and new comments are drafted to explain the change.³⁶⁴ Although it is possible to amend post-published comments, “the practice has been to include comment revisions in legislation revising related provisions.”³⁶⁵ With that said, the revisions are more likely to be amended alongside the adoption of Louisiana Civil Code article 2624.1.

CONCLUSION

A gap in the law emerges when courts are assessing bad faith breaches in purchase agreements with a stipulated damages clause. Louisiana laws and French jurisprudence support the view that when Buyer, from the hypothetical, decided to intentionally breach the purchase agreement to buy Seller’s house, Buyer was liable to Seller for \$50,000. However, various federal and state courts in Louisiana have consistently side-stepped the application of the relevant laws in their opinions to support the notion that an intentionally breaching buyer can limit his or her liability to a stipulated damages clause. Therefore, in practice, a Louisiana court would limit Buyer’s liability to the \$10,000 in stipulated damages.

By not applying the relevant laws, the holdings contradict Louisiana’s policy of good faith in contractual dealing and multiple Civil Code articles, including articles 1996, 1997, and 2004. With that said, there are reasonable policy arguments to support their holdings. The problem is that the courts are not explaining the policy reasonings, and the current

361. LA. CIV. CODE ANN art. 1997 cmt. b (2021).

362. Lonegrass, *supra* note 239, at 288.

363. *Id.*

364. *Id.*

365. *Id.* at 289.

Louisiana law does not allow for a buyer to intentionally breach a contract and limit his or her liability to a stipulated damages clause. Since that concept is not currently articulated in the Code, the legislature should enact a provision under the Sales title of the Code to express that a party may stipulate damages at the formation of the contract, and a party that intentionally breaches a contract to sell will only be liable for those stipulated damages, except in the event of fraud. Therefore, the legislature enacting the new provision will resolve any confusion regarding stipulated damages in the real estate realm.