Mistaken Assumptions and Misunderstandings of Contracting Parties in Louisiana Law and in the Restatement (Second) of Contracts

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I. INTRODUCTION

The Louisiana Civil Code provisions concerning error were recast in the 1984 revision of the titles addressing “Obligations In General” and “Conventional Obligations Or Contracts.” This article examines the revised legislation on error and the corresponding appellate decisions rendered since its enactment. Because the courts have not yet considered the entirety of the issues litigated under the former legislation, discussion includes several pre-revision decisions involving principles retained in the revised Civil Code.

This article also examines the provisions of the Restatement (Second) of Contracts concerning the topic of mistake and compares them to their Louisiana counterparts. The possible utility of Restatement approaches for Louisiana courts and of Louisiana approaches for courts of other states is considered as well.

The term mistaken assumption is used to describe a situation where at least one of the contracting parties has an erroneous belief as to the circumstances existing when the agreement is made, but both parties mutually understand all express provisions of their contract. Misunderstanding refers to a situation where the contracting parties have significantly different perceptions concerning the contractual commitments or other legal consequences to result from their transaction. This distinction has been utilized productively in several studies. It differentiates situations involving a core of agreement from those in which legal commitment can be recognized only by selecting the perceptions of one party over those of the other.

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1. The revised titles consist of Articles 1756-2057. The provisions concerning conventional obligations or contracts include five articles treating error as a concept applicable to contracts in general. These articles, numbered 1948-52, are set forth infra in the text following note 4. The revision was a project of the Louisiana State Law Institute. Professor Saul Litvinoff, Boyd Professor of Law, Louisiana State University and Director, Center of Civil Law Studies, Paul M. Hebert Law Center, was the reporter.


II. THE LOUISIANA CIVIL CODE ARTICLES ADDRESSING ERROR

The present Louisiana Civil Code contains five articles addressing error as a concept applicable to contractual obligations in general. Included among the provisions concerning "Vices of Consent," these articles provide:

Art. 1948. Vitiated consent
Consent may be vitiated by error, fraud, or duress.

Art. 1949. Error vitiates consent
Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

Art. 1950. Error that concerns cause
Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

Art. 1951. Other party willing to perform
A party may not avail himself of his error if the other party is willing to perform the contract as intended by the party in error.

Art. 1952. Rescission; liability for damages
A party who obtains rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error.

The court may refuse rescission when the effective protection of the other party's interest requires that the contract be upheld. In that case, a reasonable compensation for the loss he has sustained may be granted to the party to whom rescission is refused.

A. Article 1949

Article 1949 is a logical starting point for an examination of these provisions. If, as Article 1948 states, the consent requisite for contractual commitment is undermined by error, it is essential to limit the error having this vitiating effect. Accordingly, Article 1949 permits rescission only when the error in question concerns "a cause without which the obligation would not have been incurred." The provision further requires that the complaining party's "cause" have been known or reasonably have been knowable by the party resisting rescission. A revision comment states that the term cause is used in accordance with its Civil Code definition to identify "the reason [a party] consented to bind

4. The five articles on error constitute the first of the four sections contained in the chapter entitled "Vices Of Consent." The remaining sections address fraud, duress, and lesion.
himself.” The comment further asserts that Article 1949’s requirements are “consistent with... the jurisprudential interpretation” of the article’s antecedent in the Louisiana Civil Code of 1870. In this light, it appears that cause, as used in Article 1949, signifies an assumption that was integral to a party’s expression of legal commitment and that such an assumption is legally significant only if its existence was known or should have been known by the other party.

There is then the question whether every erroneous “but for” assumption of a complaining party provides basis for rescission if his opponent knew or should have known of the assumption and its significance. Although the word formula suggests that such an awareness would provide basis for rescission in all instances, a revision comment indicates that the party seeking rescission sometimes bears the risk of inaccuracy of his beliefs. A comment to Article 1950 refers to a concept of error as to “motive” in which error having a “decisive influence” on the decision to enter a transaction is nonetheless without legal significance. In support of this proposition, the comment quotes the French jurist Henri Capitant:

"[A]n error which does not affect the manifestation of will remains inoperative. That is the reason why an error in the motive does not annul the contract even though it exerts a decisive influence on the obligation. A buyer who buys a horse because he erroneously believes that his own has perished... would not have contracted had he been correctly informed; nevertheless the sale [is] nonetheless valid. Although the motives rest in the subjective sphere of the individual, they no doubt prompt him to engage himself, but they nevertheless, remain beyond the contractual field, they are anterior to the act of will by which the party obligates himself; they are not a constitutive element of the act of will."
Under the view expressed in the comment, a party’s consent is not undermined by his erroneous assumption concerning his need for an item having all attributes he believed it to have. Such an assumption, without more, does not require recognition of error as to cause under Article 1949. Rescission is available only if the complaining party can demonstrate additional factors making it appropriate to condition the transaction upon the accuracy of his assumption.

B. Article 1950 and Its Antecedents

In light of Article 1949’s provision, rescission seems limited to situations where the party seeking to uphold the agreement knew or should have known of the assumption that proved erroneous. However, an examination of Article 1950 suggests that there are atypical situations where the party in error should be afforded protection even though the party seeking judicial enforcement had little or no basis for detecting the assumption at issue. All of the categories of error enumerated in Article 1950 were recognized in the Louisiana Civil Code of 1870 as instances where error might preclude or vitiate consent. Further, a revision comment asserts that Article 1950 “restates principles” contained in the 1870 enactment and “does not change the law.” Accordingly, these antecedents should be considered in construing Article 1950 and in determining its relationship to Article 1949.

1. Error as to the Nature of the Contract

In the case of error as to the nature of the contract, the highly unlikely situation where the parties contemplate different generic contracts, the antecedent legislation provides that “[e]rror as to the nature of the contract will render it void.” In an illustration, the former article describes a situation where, owing to “error or ambiguity,” one party believes he has purchased, while the other believes he has pledged. The provision states that the transaction does not result in a contract. There is no express requirement that the party resisting the recognition of the legal relationship perceived by the other have had a

10. The Civil Code of 1870 identified categories of error as to “motive,” “person,” “nature,” “object,” and “law.” Error as to object included error as to “substance,” “substantial quality,” and “other qualities . . . as were the principal cause of making the contract.” See La. Civ. Code arts. 1819-46 (1870) (West comp. ed. 1972).
Error as to the nature of the contract will render it void.
The nature of the contract is that which characterizes the obligation which it creates.
Thus, if the party receives property, and from error or ambiguity in the words accompanying the delivery, believes that he has purchased, while he who delivers intends only to pledge, there is not [no] contract.
13. Id.
14. Id.
reasonable basis for his own perceptions. Further, the jurisprudence concerning this article includes decisions indicating that error as to the nature of a contract, apart from its reasonableness, precludes the recognition of contractual commitment.\footnote{See, e.g., Williams v. Robinson, 98 So. 2d 844 (La. App. 2d Cir. 1957) and Bilbe, supra note 6, at 937-43, 947.}

2. Error as to the Contractual Object

Article 1950’s next category is error as to “the thing that is the contractual object.” Under the jurisprudence construing the counterpart provision contained in the Civil Code of 1870, such error encompassed misunderstandings as to the identity of items to be sold or otherwise affected.\footnote{See, e.g., Berard’s Heirs v. Berard, 2 La. 1 (1830); Lawrence v. Mount Zion Baptist Church, 1 La. App. 404 (Orl. 1925); Patterson v. Koops, 10 Teiss. 266 (La. App. 1913).} The pre-revision jurisprudence included at least one decision in which such a misunderstanding was said to prevent the recognition of a contract without regard to the reasonableness of the parties’ respective perceptions.\footnote{See Lawrence v. Mount Zion Baptist Church, 1 La. App. 404 (Orl. 1925).}

3. Error as to a Substantial Quality

Article 1950 also refers to error as to “a substantial quality” of a contractual object. Prior to the revision, the Civil Code identified error as to “the” substantial quality of an object as an assumption providing basis for rescission. Under the pertinent provision,\footnote{La. Civ. Code art. 1844 (1870) (as amended by Acts 1871, No. 87): The error bears on the substantial quality of the object, when such quality is that which gives it its greatest value. A contract relative to a vase, supposed to be gold, is void, if it be only plated with that metal. } “the substantial quality of the object” was the quality that gave the object “its greatest value.” The former legislation further provided that a “contract relative to a vase, supposed to be gold, is void, if it be only plated with that metal.” It was unclear whether an assumption as to the existence of an attribute could affect an object’s substantial quality if the party resisting rescission lacked a reasonable basis for realizing that the assumption was being made.\footnote{Id.} However, another article of the Civil Code of 1870 concerning error as to “the substance” of a thing permits rescission when an object “supposed by one or both the parties to be an ingot of silver... really is a mass of some other metal that resembles silver.”\footnote{(Emphasis added). Article 1843 of the Civil Code of 1870 provides in its entirety: There is error as to the substance, when the object is of a totally different nature from that which is intended. Thus, if the object of the stipulation be supposed by one or both the parties to be an ingot of silver, and it really is a mass of some other metal that resembles silver, there is an error bearing on the substance of the object.}
If the erroneous belief of one party suffices for rescission in ingot transactions, it seems questionable that a shared assumption would be necessary for relief in the case of an erroneous belief as to the material from which a vase is crafted. However, in an ingot sale, each party normally is aware that the other is making an assumption concerning the composition of the metal and that this assumption is crucial to the decision to enter the transaction. Further, if parties have different assumptions concerning an ingot's composition, one of them very probably is aware that the other is mistaken. In contrast, there are situations where the material from which a vase is crafted reasonably would be regarded as a matter of little or no importance. For instance, if informed buyers would pay the seller's price with full awareness of the item's composition, the seller could assert convincingly that he did not realize that the buyer regarded the item's composition to be significant. Thus, there is question whether Article 1950's reference to error as to substantial quality was intended to encompass situations where a party resisting rescission lacked reasonable basis for realizing that the assumption was being made. The revision comments do not directly address this question. However, a comment to Article 1950 asserts that rescission is available under that article only when the requirements of Article 1949 have been met, and Article 1950 contains no express reference to error as to substance in its enumeration. In this light, it appears that the concept of error as to substantial quality provides basis for rescission only when the assumption at issue was known or should have been known by the party seeking to uphold the transaction.

4. Error as to Person

Article 1950 next identifies error as to "the person or the qualities of the other party" as occurrences that can result in error as to cause. A revision comment states that "relief may be obtained when, intending to contract with a certain person or a person of a certain quality or character, a party has given his consent to a contract with a different person, or with a person who lacks the intended quality or character." The comment concludes by asserting that "the person of the intended obligee" is presumed to be "the reason why the obligor bound himself" when the contract is gratuitous.

In the case of gratuitous contracts, it is reasonable to permit rescission on the basis of the donor's error as to the identity or attributes of the donee even in the unlikely situation where the donee did not realize that the assumption was being made. However, when onerous contracts are involved, a party who had no reasonable basis for perceiving a mistake as to his identity or attributes can

21. Revision comment (g) to Article 1950 provides: "Relief for error under this Article may be granted only when that error also meets the requirements of revised C.C. Art. 1949 . . . ."
22. See supra text following note 4.
24. Id.
challenge the appropriateness of rescission at the instance of the complain-
ing party. Nonetheless, the Civil Code of 1870 identified at least one situation where error as to person provided basis for relief despite the reasonableness of the perceptions of the party resisting rescission. An article provided that error as to person was "generally" not a basis for rescission in "onerous contracts, such as sale, exchange, loan for interest, letting and hiring."25 The next article referred to the existence of "exceptions" to this proposition and provided:

If, from the nature of the onerous contract, it results that any particular skill or quality be required in its execution, which the party with whom the contract is made, is supposed to possess, then the consideration of the person is presumed to be the principal cause, and error as to the person invalidates the contract.26

In its only example, the provision describes a situation where a party seeking the services of "an architect of great eminence" deals instead with "one of the same name, who has little or no skill" and provides that the resulting agreement is "void."27 Because of the many subjective factors involved in the selection of an architect,28 the example does little to determine the extent of the article's "exception" to the "general" unavailability of rescission for error as to person in onerous contracts. However, other articles of the Civil Code of 1870 concerning "Personal, Heritable and Real Obligations" provide assistance in considering this issue. Under these provisions, an obligation of a party to provide "labor, skill or industry," is said to be "personal" as to the obligor in that his death extinguishes his obligation to render the performance.29 The contract is also personal as to the obligor because his performance cannot be delegated to another

27. According to the French language text of Article 1831 of the Civil Code of 1825, the counterpart of Article 1837 of the Civil Code of 1870, the party whose services were requested is in fact an architect. See La. Civ. Code art. 1837 (1870); La. Civ. Code art. 1831 (1825) (West comp. ed. 1972).
28. Id. Further, in the French language text of the counterpart provision of the Civil Code of 1825, the party of the same name has neither talent nor reputation.
An obligation is strictly personal, when none but the obligee can enforce the performance, or when it can be enforced only against the obligor.
It is heritable when the heirs and assigns of the one party may enforce the performance against the heirs of the other.
Id. Article 2007:
All contracts for the hire of labor, skill or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee.
Contracts of mandate and partnership are mutually personal.
party without the consent of the obligee to whom the performance is owed. Further, under the terms of the Civil Code of 1870, these concepts apply to obligations that can be "as well performed by any other as by the obligor, unless there be some special agreement to the contrary."

If the identity of a party has such significance once a contract has been made, it probably is appropriate to accord identity a like significance when the availability of rescission is at issue. Accordingly, it seems reasonable to regard the former law as having permitted a party to rescind an agreement simply by demonstrating that he contracted for services with one other than the person he was seeking. This approach would subject a good faith party to rescission, even in situations where he has changed his position as a consequence of the agreement. The Civil Code of 1870 acknowledged this possibility and provided that "if anything be done by the person thus employed, who was ignorant of the mistake, a compensation, proportioned to his service, is due."

In light of this history and of the continuing availability of reliance damages under present Article 1952, it appears that the revision's concept of error as to person permits rescission even when the party seeking enforcement of the agreement had no reason to realize that he was being mistaken for another. However, the language of Article 1949 arguably poses an obstacle to this view. Under the text of this provision, the complaining party's assumption must have been one that "was known or should have been known to the other party." Further, as previously noted, a comment to Article 1950 states that relief is available under the article's terms only when the requirements of Article 1949 have been met. A good faith party resisting rescission can assert convincingly that he did not know that the complaining party assumed he was someone else. If pressed, however, the party resisting rescission also might concede that the complaining party believed he was transacting with the party with whom he wanted to deal. If the sole purpose of Article 1949 were the protection of reasonably based contractual expectations, the mistaken assumption as to identity should be regarded as unknown to the party resisting rescission, and the agreement should be enforced. If, on the other hand, the drafters of the provision were concerned also with situations where the recognition of a contract would result in legal consequences radically different from those contemplated by the complaining party, the party resisting rescission should be viewed as having been aware of the complaining party's assumption.

30. If an obligation to perform services is classified as personal in the event of the obligor's death, it is reasonable to assume that the obligee can assert the personal nature of the obligation if performance is tendered by anyone other than the obligor.
32. Id. art. 1837 (1870).
33. See infra text accompanying notes 38-48.
34. Id.
35. See supra note 21.
5. **Error as to Law and as to Any Other Circumstance**

Article 1950's enumeration of legally significant categories of error concludes by identifying erroneous assumptions as to "the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation."\(^{36}\) The express recognition of error of law as a possible basis for rescission is in keeping with the provision of the Civil Code of 1870.\(^ {37}\) In situations involving error of law or error as to "any other circumstance" that the parties regarded or should have regarded as affecting cause, rescission clearly is limited in accordance with Article 1949's requirement that the party resisting rescission have known or have had basis for knowing of the assumption at issue.\(^ {38}\)

C. **Article 1952**

1. **The Relevance of Article 1952 to Articles 1949 and 1950**

In identifying assumptions affecting cause, the first paragraph of Article 1952 must be considered. It requires a party who obtains rescission "on grounds of his own error" to compensate the party resisting rescission for the "loss thereby sustained" unless the "latter knew or should have known of the error."\(^ {39}\) As discussed earlier,\(^ {40}\) Article 1949 limits rescission to situations where the party resisting rescission knew or had basis for knowing of the existence of the complaining party's assumption. Accordingly, with the exception of assumptions that were known or knowable by the party resisting rescission, it is difficult to envisage situations where a party could obtain rescission on the basis of "his own error." However, Article 1950's categories of error as to the nature of the contract and error as to the identity of the contractual object involve misunderstandings that can be characterized as having stemmed from a party's "own error." If one party reasonably regards the other to have consented to a specific generic contract and the latter unreasonably believes that a different generic contract was identified, the misunderstanding very probably precludes the recognition of a contract defined in accordance with the perceptions of the more reasonable party.\(^ {41}\) A similar situation would exist if each party intended an agreement with a different contractual object, but only one party had reason to know that the other had a different intention. Also, if error as to person justifies relief where the party resisting rescission lacked basis for realizing that his

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36. See supra text following note 4.
37. Article 1846 of the Civil Code of 1870 expressly recognized error of law as a basis for rescission. Article 1840 of the Civil Code of 1825 contained a nearly identical provision.
38. See supra text following note 4.
39. See supra text following note 4.
40. See supra text preceding note 5.
41. See supra text accompanying notes 12-15.
services were not being sought, the mistake as to identity readily can be attributed to the other party.

In situations where one party is responsible for the misunderstanding that prevents the recognition of a contractual relationship, he can be regarded as having obtained rescission on the basis of "his own error." In these circumstances, Article 1952 should require this party to compensate the other for any reasonable reliance. Because error as to the nature of the contract and error as to the contractual object technically may be obstacles to contract formation, however, it can be argued that these misunderstandings do not result in agreements that might be rescinded. If this argument were accepted, Article 1952 nonetheless should be extended by analogy when the misunderstanding can be attributed to one of the parties. Also, the Civil Code articles on detrimental reliance and delict provide bases for responsibility where a change of position can be attributed to the fault of the party resisting the recognition of contractual commitment.

Whether Article 1952 was intended to have other areas of application is not clear. A revision comment accompanying the article states: "Under this Article, a party in error who obtains rescission is liable to the other party for the injury to the latter's interest that the rescission may cause. Previously, when error has been invoked, Louisiana courts have regarded the problem solely as one of rescission vel non." The comment then cites two appellate cases in which contractors unsuccessfully sought rescission on the basis of their mistakes in the formulation of bids. Consequently, the comment strongly implies that rescission in such situations now will be available under Article 1952. To permit rescission in such a situation seems inconsistent with Article 1949's requirement that the party resisting rescission have known or have had basis for knowing of the assumption on which rescission is based. The complaining party, of course, can assert that the party resisting rescission should know that a bid normally is believed to be sufficient to recoup all costs of performance and to provide a net

42. See supra text accompanying notes 22-35.
43. A number of French jurists have advocated a concept of erreur-obstacle in which certain misunderstandings including error as to the nature of the contract and error as to the contractual object are obstacles to contract formation. See Saúl Litvinoff, "Error" in the Civil Law, in Essays on the Civil Law of Obligations 230-34 (Joseph Dainow, ed., LSU Press 1969); Saúl Litvinoff, Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion, 50 La. L. Rev. 1, 10-11 (1989). Professor Litvinoff asserts that "there is no room in the Louisiana Civil Code for the doctrine of erreur-obstacle, because of its careful enumeration of different categories of error, all of which are just vices of consent and give rise to a nullity which is only relative." Id. at 10-11. Under this view, reliance damages could be awarded under Article 1952 in cases where error as to the nature of a contract or error as to a contractual object can be attributed to a party's "own error."
44. Civil Code article 1967, the provision concerning detrimental reliance, is quoted infra in note 225. Delictual responsibility is addressed generally in Civil Code articles 2315-2324.2. Articles 2315, 2316, and 2323 are relevant in determining the significance of a contracting party's fault in situations where error prevents the recognition of a contractual commitment.
46. See supra text preceding note 5.
return. However, as the revision comment notes, such assumptions have not been recognized as grounds for rescission under the prior legislation. If it is possible for them to be so regarded under the revised articles, it will be necessary to develop criteria for differentiating the bidding errors that do and do not constitute basis for relief. To date, the Louisiana appellate courts have not considered the possible application of Article 1952 to such a controversy.

Much can be said for a scheme that would relieve a party from a financially devastating contract while requiring him to compensate the other party for reliance damages incurred as a consequence of the commitment. The Restatement (Second) of Contracts, for instance, advocates this approach when the enforcement of a contract would be "unconscionable." However, if Article 1949's knowledge requirement is no barrier to rescission in some situations where services have been promised for less than their cost to the performing party, parties logically will invoke Article 1952 as basis for rescission in other circumstances where relief is doubtful under the requirements of Article 1949.

2. Fault as a Requisite for Responsibility

Article 1952 will present other issues requiring judicial attention. For instance, it will be necessary to determine whether fault must be established in order to impose responsibility for reliance damages when rescission is grounded upon a party's own error. If Article 1952 were construed to permit rescission in certain situations where relief would be unavailable under Articles 1949 and 1950, there would be no need in these circumstances to assess fault in determining responsibility for detrimental reliance. Instead, the situation should be regarded as one in which rescission is extended to a party otherwise unentitled to relief on the condition that he compensate the other party for his detriment.

In contrast, where there has been error as to the nature of the contract or error as to the identity of the contractual object, fault is the appropriate basis for determining responsibility for reliance damages. In these circumstances, misunderstandings have prevented any agreement in fact. Further, Articles 1949 and 1950 very probably preclude the recognition of a contract defined in accordance with the intentions of the party whose perceptions were better based. Accordingly, fault is the only basis for requiring one party to compensate the other for the adverse consequences of their misunderstanding.

The case of error as to the person presents a situation where it is probably appropriate to permit reliance damages without confirming the culpability of the party asserting the error. In this atypical situation, it seems sufficient that the party seeking compensation for his reliance reasonably believed his services to

47. See Restatement (Second) of Contracts § 153(a) (1981).
48. If a contracting party can be regarded as having expressed the "promise" the other party reasonably perceived him to have made, responsibility can be recognized in accordance with the promisee's perceptions under the Civil Code's detrimental reliance provision, Article 1967. See supra notes 42-44, 225, 427-429 and accompanying text.
be sought when he changed position as a consequence of the complaining party's expression of agreement.

3. Monetary Awards in Lieu of Rescission

The second paragraph of Article 1952 authorizes a monetary award not to temper the impact of rescission but to compensate a party denied rescission because "the effective protection of the other party's interest requires that the contract be upheld." A revision comment describes a situation where a money judgment appropriately might be granted to a party to whom rescission is denied:

[I]f through error a party conveyed to another a piece of property different from the one he intended to sell, and the transferee then built valuable improvements upon the property, it would seem that the transferee could be protected only by upholding the contract. If the property actually conveyed was considerably more valuable than the one intended, however, the transferee would obtain a great advantage if this were done. In such a case, an award of reasonable compensation to the transferor would insure a fair solution.

In this example, a good faith party's construction upon property he reasonably believed he had purchased is identified as justification for denying the rescission that otherwise would be available as a consequence of the misunderstanding. The comment provides no further guidance concerning instances where monetary adjustments, as opposed to rescission, might be appropriate. It seems reasonable, however, to regard the article as basis for such an award in any instance where the totality of the circumstances compels a decision to deny the rescission to which a party otherwise would be entitled.

Furthermore, because Article 1952 was designed to enhance judicial discretion in the formulation of remedies, its second paragraph possibly could be regarded as basis for adjusting the terms of an agreement that could not be rescinded under the other error provisions. However, it is unlikely that the article was intended to provide the possibility of imposing a cost upon the enforcement of contracts that have been enforceable under pre-revision law and that continue to be protected from rescission under present Articles 1949 and 1950. Thus, even if Article 1952's first paragraph were construed to permit rescission in situations where relief cannot be justified under any other article, application of the second paragraph very probably would be limited to situations where rescission would be granted under Articles 1949 and 1950 in the absence of the atypical circumstances.

49. See supra text following note 4.
D. Article 1951

Finally, Article 1951 should be mentioned. It provides that "[a] party may not avail himself of his error if the other party is willing to perform the contract as intended by the party in error." This provision clearly affirms what hopefully would have been ruled in its absence and precludes a contrary contention that the parties' misunderstanding prevents the recognition of a contractual relationship.

III. MISTAKE UNDER THE RESTATEMENT (SECOND) OF CONTRACTS

Chapter six of the Restatement (Second) of Contracts [hereinafter the Restatement] concerns the significance of mistakes made by contracting parties. Mistake is defined in Section 151 as "a belief that is not in accord with the facts." The comment to the section emphasizes that the concept of mistake is limited to mistaken beliefs as to "facts as they exist at the time of the making of the contract." Thus, the legal significance of erroneous assumptions as to future circumstances is not determined under the Restatement's provisions on mistake. The comment to the section also asserts that "facts" include "law" in existence at the time of the making of the contract. Accordingly, "[a] party's erroneous belief with respect to the law, as found in statute, regulation, judicial decision, or elsewhere, or with respect to the legal consequences of his acts," may constitute mistake.

The chapter next addresses the mistakes that may make a contract "voidable." Although the Restatement does not use the terms unilateral, mutual, or common in identifying categories of mistake, it nonetheless differentiates "a mistake of both parties" from "a mistake of one party" insofar as the requirements for rescission.

A. Section 152

§ 152. When Mistake of Both Parties Makes a Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

51. See Restatement (Second) of Contracts § 151 cmt. a (1981).
52. The Restatement analyzes erroneous assumptions as to future circumstances in terms of impracticability of performance and frustration of purpose. Id. §§ 261-72.
53. Id. § 151 cmt. b.
54. Id. §§ 152, 153.
(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

1. A Basic Assumption

The first of the three requirements for avoidance is that the mistake have concerned a "basic assumption on which the contract was made." The comment to the section states that the term "basic assumption" is used as it is employed in the Restatement chapter on impracticability and frustration. Reference to that chapter indicates that the expression has the meaning that it has in Uniform Commercial Code § 2-615(a). In that provision, the term identifies situations where the assumption of "the non-occurrence" of "a contingency" is so fundamental that the duty to render the promised performance is modified or discharged by the contingency's occurrence.

Restatement sections 262-64 identify specific situations where the "non-occurrence" of events may constitute basic assumptions. Death or incapacity of a particular person, destruction, deterioration, or failure to come into existence of a thing necessary for performance, and prevention by governmental regulation or order are recognized as contingencies that may result in supervening impracticability. Additionally, Section 266 affirms that existing impracticability or frustration may prevent a contractual duty from arising if the nonexistence of the undetected circumstances is a basic assumption of the agreement. The section's illustrations of such assumptions include situations where: parties contract to sell machinery without awareness that it has been destroyed by fire; a newly enacted zoning ordinance precludes the issuance of...
a building permit a seller promises to procure for his buyer; and the invalidity of a public bidding contract awarded to a general contractor prevents him from affording a subcontractor the promised opportunity to perform work under their subcontract.

Section 152 includes six of its own illustrations of mistake as to a basic assumption. The first involves circumstances closely analogous to Section 266's example concerning the agreement to sell machinery that has been destroyed by fire. In Section 152's illustration, parties contract for the conveyance of what they believe to be timber land subsequent to a fire that has destroyed the timber. In the next illustration, parties contract to convey land for a lump sum "on the basis of the report of a surveyor," but the tract actually contains ten per cent more acreage than the survey reveals. The next three illustrations also involve situations where shared assumptions clearly have shaped the terms of the transaction: parties agree to an assumption of a mortgage in circumstances where the actual amount of the mortgage indebtedness is only a fraction of the amount it is believed to be; the parties to an agreement to assign indebtedness secured by a mortgage mistakenly believe that a valuable building is located on the mortgaged property; parties agree to assign what is believed to be an unsecured indebtedness of an insolvent party in circumstances where the indebtedness actually is secured. In the final example, a party pays the premium on an annuity contract based upon the life of a third person who is no longer living when the premium is paid.

Section 152 contains no illustration of an assumption that should not be classified as basic. However, the section's comment states that "market conditions and the financial situation of the parties are ordinarily not such assumptions." The comment continues: "Generally, just as shifts in market conditions or financial ability do not effect discharge under the rules governing impracticability, mistakes as to market conditions or financial ability do not justify avoidance under the rules governing mistake.

In light of the foregoing sections, including their comments and illustrations, it appears that assumptions are regarded as basic only if they significantly affect the terms of the agreement. In Section 152's illustrations, the erroneous assumptions resulted in contracts that otherwise would not have been made or would have been made only with material adjustments to the terms of the

63. Id. illus. 2.
64. Id. illus. 3.
65. Id. § 152 illus. 1.
66. Id. illus. 2.
67. Id. illus. 3.
68. Id. illus. 4.
69. Id. illus. 5.
70. Id. illus. 6.
71. Id. § 152 cmt. b.
72. Id.
transaction. Additionally, the comment concerning the "general" insignificance of assumptions as to market conditions and financial abilities emphasizes that some shared assumptions provide no basis for rescission, even in situations where the transaction would not have occurred in the absence of the mistake. Section 152 offers no further guidance concerning the differentiation of assumptions that do and do not provide basis for rescission. The absence of any additional direction can be explained in part by the difficulty in specifying criteria susceptible of general application. Further, the term basic, like the other inexact expressions utilized in the chapter, is intended to facilitate judicial discretion in effecting just allocations of risk. Finally, any concern that the term might be construed to include assumptions that should not have legal significance is largely negated by the existence of Section 152's further restrictions upon the availability of rescission.

2. Material Effect on Agreed Exchange

Section 152 requires that the erroneous "basic assumption" have had a "material effect on the agreed exchange of performances." The comment relates that this test is not met by establishing that the agreement would not have been made without the mistake. Instead, a complaining party "must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out." In determining whether the requisite materiality exists, "the overall impact on both parties" is considered. According to the comment, assumptions having a material effect on an exchange normally cause the exchange to be more advantageous to one party and less desirable to the other. However, the comment further suggests that it is possible in "exceptional" cases that the "adversely affected party may be able to show that the effect on the agreed exchange has been material simply on the ground that the exchange has become less desirable to him, even though there has been no effect on the other party." No example of such circumstances is given. The comment asserts that "[c]ases of hardship that result in no advantage to the other party" ordinarily should be analyzed in terms of impracticability and frustration.

3. Allocation of Risk

Even in situations where a basic assumption has had a material effect on an agreed exchange of performances, Section 152 denies rescission if the complain-
ing party bears the risk of the mistake under the principles outlined in Section 154. That provision will be discussed following an examination of Section 153.

B. Section 153

§ 153. When Mistake of One Party Makes a Contract Voidable
Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his fault caused the mistake.

This section, like Section 152, requires that a legally significant mistake involve a basic assumption, that it have a material effect on the agreed exchange of performances, and that the risk of the mistake’s occurrence not be borne by the complaining party. In the language of the comment, a party seeking to avoid a contract for “a mistake that he alone made . . . must at least meet the same requirements that he would have had to meet had both parties been mistaken.” By imposing a requirement that the erroneous assumption be “basic,” the Restatement affirms the existence of judicial discretion in determining the availability of rescission. Because discretion is also involved in assessing an error’s impact on an exchange of performances and in determining the existence of unconscionability, it is unlikely that the outcome of a controversy would hinge upon the classification of an assumption if unconscionability were alleged as basis for avoidance. In instances where relief is sought through contention that the opposing party had reason to know of a mistake, however, the availability of rescission could depend solely upon a determination of whether an assumption was basic.

The comment to Section 153 states that the “most common sorts” of mistakes involving basic assumptions with material impacts “occur in bids on construction projects and result from clerical errors in the computation of the price or in the omission of component items.” With the exception of illustrations involving mistake as to the identity of a contracting party and misunderstanding as to the dimensions of land, all of the section’s illustrations

80. *Id.* § 153 cmt. b.
81. *Id.*
82. *Id.* illus. 11-13.
83. *Id.* illus. 5.
involve situations where a contractor has agreed to perform services or construction for a price that would not recoup the cost of performance.

**Unconscionability**

Neither Section 153 nor its comment purports to define unconscionability; however, the comment asserts that some of the standards outlined in the comment to the Restatement section on unconscionability are similar to the factors involved in Section 153 determinations.\(^84\) The referenced comment to Section 208 relates that "gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable"\(^85\) and that such "a disparity may also corroborate indications of defects in the bargaining process."\(^86\) Comment to Section 153 provides that the mistaken party "must ordinarily show not only the position he would have been in had the facts been as he believed them to be but also the position in which he finds himself as a result of his mistake."\(^87\) An examination of the illustrations indicates that unconscionability can be recognized on the basis of the severity of the loss that would result from contract enforcement. The first illustration involves a contractor whose mistake in addition results in his submission of a bid for $150,000 instead of the $200,000 figure that a correct calculation would have produced.\(^88\) Performance for $150,000 would result in a $20,000 loss, and a $30,000 profit would be earned with a $200,000 price. The illustration states that the contract is voidable if "the court determines that enforcement of the contract would be unconscionable."\(^89\) The next illustration is a variation of the first in which the contractor, again as a consequence of a mistake in addition, agrees to perform work for $150,000. In this situation, accurate addition would have resulted in a bid of $185,000. Performance for $150,000 would result in a loss of $5,000, and performance for $185,000 would yield a profit of $30,000. The illustration concludes that the "court may reach a result contrary to that in [the preceding illustration] on the ground that enforcement of the contract would not be unconscionable, and hold that it is not voidable."\(^90\)

The illustrations also recognize the possibility of identifying unconscionability in instances of significant misunderstandings. In one case, a buyer accepts a seller's offer to sell land designated by a street address for $100,000 while mistakenly believing "that this description includes an additional tract of land worth $30,000."\(^91\) No information is provided concerning the market value of

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84. Id. cmt. c.
85. Id. § 208 cmt. c.
86. Id.
87. Id. § 153 cmt. c.
88. Id. illus. 1.
89. Id.
90. Id. illus. 2.
91. Id. illus. 5.
the property actually owned by the seller, but the possibility of unconscionability is said to exist. Another illustration\(^{92}\) involves circumstances patterned upon the controversy in *Raffles v. Wichelhaus*.\(^{93}\) In this example, parties agree to the sale of goods to be shipped ex steamer *Peerless* in circumstances where only one of the parties has reason to know that there are two steamers of that name with significantly different sailing dates. After noting that Restatement section 20 permits the recognition of a contract defined in accordance with the perceptions of the party without reason to know of the existence of two ships, the illustration provides that such a contract is voidable if a court concludes that its enforcement would be unconscionable.

The comment to Section 153 also addresses the role of reliance in unconscionability determinations. It expressly states that reliance by the party resisting rescission “may make enforcement of a contract proper although enforcement would otherwise be unconscionable.”\(^{94}\) The discussion contrasts a situation where rescission only deprives the party seeking enforcement of his expectation interest and a situation involving “substantial” reliance where “avoidance may leave that reliance uncompensated.”\(^{95}\) Even in cases involving such reliance, however, the comment asserts that avoidance should be available if a monetary award adequately would compensate the party who relied upon the agreement.\(^{96}\)

In addition to instances of unconscionability, avoidance is available under Section 153 in situations where the party resisting rescission “had reason to know of the mistake or his fault caused the mistake.”\(^{97}\) The comment emphasizes that avoidance of a contract is available in these circumstances “regardless of whether its enforcement would be unconscionable.”\(^{98}\) The illustrations identify two situations where a finder of fact could conclude that one party had reason to know of the other’s mistake. In one case, a property owner obtains ten bids ranging between $180,000 and $200,000 and himself estimates $180,000 as the likely cost of the construction.\(^{99}\) He thereafter accepts a bid of $150,000. The illustration asserts that the discrepancy between the $150,000 bid and the ten other bids, as well as the owner’s own estimate, can justify a conclusion that the owner had reason to know of the mistake and thus provide basis for avoidance of the contract. In the other illustration, an option contract resulting from a general contractor’s ostensible reliance upon a subcontractor’s bid in the formulation of his own successful bid is said to be voidable if the general contractor had reason to know of the subcontractor’s mistake.\(^{100}\)

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92. *Id.* illus. 6.
95. *Id.*
96. *Id.*
97. *See supra* text following note 79.
99. *Id.* illus. 9.
100. *Id.* illus. 10.
Under both Sections 152 and 153, a party otherwise entitled to rescission is
denied relief if he bears the risk of the mistake in question. Section 154
addresses allocation of risk for the purposes of the preceding two sections.

§ 154. When a Party Bears the Risk of a Mistake
A party bears the risk of a mistake when
(a) the risk is allocated to him by agreement of the parties, or
(b) he is aware, at the time the contract is made, that he has only
limited knowledge with respect to the facts to which the mistake relates
but treats his limited knowledge as sufficient, or
(c) the risk is allocated to him by the court on the ground that it
is reasonable in the circumstances to do so.

The comment concerning the first subsection states that a party may agree
“by appropriate language or other manifestations” to perform “in spite of mistake
that would otherwise justify his avoidance.” An insurer’s assumption of “the
risk of loss of property covered as of a date already past” is identified as an
instance of express risk undertaking. The sole illustration of allocation by
agreement concerns a contract to sell land in which the seller promises to convey
“only such title as he has.” Both buyer and seller, however, believe that the
seller has good title, and no title search has been performed on behalf of either
party. The seller makes no representation regarding his title. Despite the
existence of the shared assumption concerning the seller’s title, the risk of
mistake is said to have been allocated to the buyer by the agreement of the
parties. Accordingly, the buyer is not entitled to relief if the title is found to be
defective.

Section 154’s second basis for risk allocation concerns a party who, despite
awareness of his limited knowledge concerning circumstances as to which he
later claims mistake, “treats his limited knowledge as sufficient.” The comment
states that an allocation is made pursuant to this provision only if the party
seeking rescission was “aware that his knowledge was limited but undertook to
perform in the face of that awareness.” Beyond an assertion that these
situations involve “conscious ignorance,” nothing is said to indicate whether such
an undertaking requires anything beyond an expression of contractual commit-
ment. The only illustration concerning this basis for allocation involves parties
who contracted to sell land “on the basis of the report of a surveyor.” Prior
to the making of the agreement, the seller proposed the inclusion of a provision

101. Id. § 154 cmt. b.
102. Id.
103. Id. illus. 1.
104. Id. cmt. c (emphasis added).
105. Id. illus. 2.
permitting an adversely affected party to "cancel the contract in the event of a material error in the surveyor's report," but the buyer refused to agree to such a provision. The subsequent discovery that the property contains ten percent more acreage than the survey identifies is rejected as a basis for rescission because the seller "bears the risk of the mistake." 

The section's final provision concerns risk allocation "by the court on the ground that it is reasonable in the circumstances to do so." The comment explains the provision by asserting that there are situations where risks should be allocated to a party for reasons other than those identified in the preceding subsections.

The comment suggests that a court, in making such a determination, "will consider the purposes of the parties and will have recourse to its own general knowledge of human behavior in bargain transactions." The comment's single example and the section's four illustrations all involve situations where the risk of mistake is allocated to the complaining party. Each situation involves a setting in which courts generally have denied rescission. The illustrations include both shared assumptions and a situation where the mistake is made only by the complaining party. The comment asserts that refusals to rescind agreements to sell farm land when "valuable mineral rights have newly been found" can be explained in terms of a judicial belief that this risk should be borne by sellers. The first illustration concerns a complaining party who supplies the premium for an annuity contract payable to a third party during the latter's life. It subsequently is discovered that the third party, at the time the contract was made, was "afflicted with an incurable fatal disease" and was destined to die within the year. The parties to the contract are described as having shared a belief that the third party was in good health with a normal life expectancy. Nonetheless, the Restatement asserts that the appellate decisions denying avoidance in similar circumstances reflect judicial determinations that all pertinent factors, including precedent, justify risk allocations to the adversely affected parties.

The next two illustrations are variations of illustrations in Restatement section 266 concerning existing impracticability or frustration. Both of the Section 154 illustrations involve builders who seek to avoid contracts because of unanticipated difficulty and expense in rendering the promised performances. In one situation, the problems can be overcome by utilizing "special equipment at
an additional cost of about twenty percent."\textsuperscript{115} In the other illustration, where the builder has agreed to construct a house, he and the other party believe that subsoil conditions are normal.\textsuperscript{116} In fact, some of the land must be drained at an expense that would leave the builder "no profit under the contract." In both situations, the risk is allocated to the builder, and rescission, therefore, is unavailable. Similarly, the final illustration rejects a builder's demand to be relieved of a commitment resulting from a "mistaken estimate as to the amount of labor required to do the work."\textsuperscript{117} The illustration is a variation of a Section 153 illustration concerning the existence of unconscionability where a builder omits a substantial sum in totaling a column of figures. In the Section 153 illustration,\textsuperscript{118} courts are directed to consider the possibility that unconscionability exists. In the final illustration of Section 154, however, the mistake as to the amount of labor necessary to perform the contract is identified as one that should be allocated to the builder.

\textbf{D. Sections 155 and 156}

\textsection{} 155. When Mistake of Both Parties as to Written Expression Justifies Reformation

Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.

\textsection{} 156. Mistake as to Contract Within the Statute of Frauds

If reformation of a writing is otherwise appropriate, it is not precluded by the fact that the contract is within the Statute of Frauds.

Section 155 permits reformation only in situations where both parties are mistaken as to the contents or effect of a writing. Reformation pursuant to this section corrects mutual error made in the expression of an agreement and permits the enforcement of the contract as it was intended by both parties. Accordingly, even though an error made in reducing an agreement to writing can be regarded as a mistake concerning a basic assumption, the possibility of rescission under Section 152 will not be considered unless reformation is for some reason precluded. As stated in Section 155's comment, "[o]ne party may . . . seek reformation in order to prevent avoidance by the other."\textsuperscript{119}

\textsuperscript{115} Id. illus. 4.
\textsuperscript{116} Id. illus. 5.
\textsuperscript{117} Id. illus. 6.
\textsuperscript{118} Id. § 153 illus. 1. The illustration is discussed supra in the text accompanying notes 84-90.
\textsuperscript{119} Id. § 155 cmt. b.
The comment also emphasizes that reformation is unavailable in instances where parties correctly express an agreement that would not have been made in the absence of a mistaken assumption of one or both parties. Because the writing in such a situation accurately sets forth the agreement as it was made, there is no basis for reformation, and the complaining party must seek a ground for avoidance under Section 152 or 153. The comment also stresses that reformation can occur only when there is a prior agreement to which the disputed writing can be conformed. Further, the section’s requirement of mutual error is said to apply even in instances where one party knows that a writing does not correctly express the preexisting agreement. However, relief in this situation is made available through the Restatement section on fraudulent misrepresentation. Additionally, the comment to Section 155 notes that the parol evidence rule is no bar to reformation under the terms of Restatement section 214.

Section 156 affirms that reformation is available even though a contract based upon the reformed writing will be within the Statute of Frauds. The comment states that the “premise underlying the rule . . . is that a writing evidencing an agreement may be reformed . . . before it is subjected to the requirements of the Statute of Frauds.” Accordingly, either the omission or the misstatement of a term required by the statute is basis for reformation if both parties were mistaken as to the writing’s contents. The comment also notes that reformation is precluded if the parties were aware that a document did not include a term necessary to satisfy the statute. In the corresponding illustration, parties who orally have agreed to sell land sign a document they know to omit any reference to the agreed price. Although neither party was aware of the consequences of the omission, reformation will not be granted to incorporate a provision the parties knowingly excluded.

E. Section 157

§ 157. Effect of Fault of Party Seeking Relief

A mistaken party’s fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
The section affirms that rescission is not precluded by the failure to exercise reasonable care in identifying the circumstances existing at the time of contracting. Similarly, reformation is said to be available despite a complaining party’s failure to have read the document in dispute. These remedies are foreclosed only when a party’s fault can be characterized as “a failure to act in good faith and in accordance with reasonable standards of fair dealing.” A differentiation of the standards of care is provided through two of the section’s illustrations. The first refers to Section 153’s illustration concerning the contractor who, as a consequence of an error in addition, agrees to perform construction for a sum that would result in a significant loss. Section 157’s illustration asserts that the builder’s negligence “in totalling and verifying his figures” does not constitute “a failure to act in good faith and in accordance with reasonable standards of fair dealing.” Consequently, the courts are directed to assess the assertion of unconscionability despite the complaining party’s failure to exercise reasonable care. The second illustration alters the first by having the recipient of the bid request the builder to check his figures to ascertain whether a mistake has been made. The builder falsely asserts that he has verified his computations when “such a check would have revealed his mistake.” After receiving this assurance, the recipient accepts the bid. The builder’s conduct is said to involve a failure to act in good faith and in accordance with reasonable standards of fair dealing, and he, for that reason, is precluded from asserting unconscionability.

F. Section 158

§ 158. Relief Including Restitution

(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 376.

(2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties’ reliance interests.

The comment to the section asserts that each party to a contract “ideally” would return the benefits he has received upon the avoidance of the agreement. Because the in specie return of a benefit received may be either

127. Id. § 157 cmt. b.
128. Id. cmt. a.
129. Id. illus. 1. Section 153’s illustration 1 is discussed supra in the text accompanying notes 84-90.
130. Id. illus. 2.
131. Id. § 158 cmt. b.
inappropriate or impossible, however, Section 158’s first subsection permits restitution through a monetary award made pursuant to Restatement section 376. The first subsection also authorizes a contractual recovery pursuant to Restatement section 240 where a party has completed a segment of his total performance that is the agreed equivalent of a corresponding return performance. In this situation, the latter performance will be enforced despite the avoidance of the agreement.

The second subsection addresses situations where the first subsection’s provisions will not prevent injustice. Under the second provision, not only Section 376, but also the entirety of Chapter 16, can be considered in an effort to avoid injustice. Chapter 16 contains the Restatement’s treatment of remedies, including provisions on damages, specific performance and injunction, restitution, and preclusion by election and affirmance. Much of this material has no bearing upon the issues that may result from contract avoidance. However, the chapter includes the section on reliance damages, the sections concerning specific performance, and the provisions complementing Section 376’s recognition of restitutory remedies in the case of rescission resulting from mistake. Accordingly, the reference to Chapter 16 in itself could be basis for recognition of reliance claims and perhaps also for other remedies in addition to restitution. However, the remainder of Section 158’s provision obviates any need to determine the extent of the remedies that might be justified solely by the reference to Chapter 16. The section concludes by authorizing “relief on such terms as justice requires including protection of the parties' reliance interests.”

The comment affirms that the section authorizes recovery where factors justify a decision to hold one party responsible for the other's detrimental reliance. The comment's only example of a reliance based recovery involves a reference to an illustration to Section 153, the provision concerning mistakes made by one party alone. In the referenced illustration, a builder who has contracted to perform construction for a sum significantly less than his costs refuses to render performance. The property owner whose contract has been repudiated then incurs reasonable expenses in obtaining bids from other builders. The illustration refers to Section 158 and asserts that the contract may be found unconscionable, despite the owner's expenditures, because a court can require the builder to reimburse the owner for the expenses he has incurred.

The comment also asserts that the section permits a court “to ‘sever’ the agreement [affected by mistake] and require that some unexecuted part of it be performed on both sides, rather than to relieve both parties of all their du-

132. The chapter consists of Sections 344-85.
134. Id. §§ 357-69.
135. Id. §§ 370-75, 377.
136. Id. § 158 cmt. b.
137. Id. § 153, illus. 8.
tizes."\textsuperscript{138} The comment further suggests that courts should consider the possibility of supplying "a term that is reasonable in the circumstances," if rescission will not avoid injustice.\textsuperscript{139} In an illustration to the section, parties contract to sell land described as containing 100 acres, at a price of $100,000, "calculated from the acreage at $1,000 an acre."\textsuperscript{140} Because the land actually contains only 90 acres, the agreement is said to be voidable by the buyer under Section 152 because of the material impact of the shared assumption upon the agreed exchange of performances. According to the illustration, if the court concludes that avoidance of the contract will not prevent injustice, it has discretion to deny rescission and "to grant relief on such terms as justice requires."\textsuperscript{141} Thus, if the court grants the buyer a $10,000 reduction in price, he cannot obtain rescission on the basis of Section 152 because the price adjustment corrects the imbalance in the exchange of performances.

The comment additionally asserts as a general proposition that a party who has not been materially affected by a mistake should be allowed to assent to a modification that eliminates the adverse effects of the mistake upon the other party.\textsuperscript{142} In the language of the comment, "[a] court may, under Subsection (2), grant the party who has not been adversely affected what is, in effect, an option to enforce the contract on new terms."\textsuperscript{143}

Finally, the comment asserts that an exercise of discretion under subsection (2) may be appropriate when both parties share responsibility for the mistake at issue.\textsuperscript{144}

IV. THE LOUISIANA POST-REVISION JURISPRUDENCE CONCERNING MISTaken ASSUMPTIONS

The Louisiana appellate courts do not differentiate mistaken assumptions and misunderstandings. Instead, the courts analyze cases in both categories in terms of a "principal cause" concept developed in applying the error provisions of the Civil Codes of 1825 and 1870.\textsuperscript{145} Article 1826 of the Civil Code of 1870 and its counterpart in the Civil Code of 1825 provide that "[n]o error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it."\textsuperscript{146} This provision was applied in almost

\begin{footnotes}
138. \textit{Id.} § 158 cmt. c.
139. \textit{Id.}
140. \textit{Id.} illus. 1.
141. \textit{Id.}
142. \textit{Id.} cmt. c.
143. \textit{Id.}
144. \textit{Id.}
145. \textit{See} \textit{Bilbe, supra note} 6, \textit{at} 900.
146. Article 1820 of the Civil Code of 1825 and Article 1826 of the Civil Code of 1870 are identical.
\end{footnotes}
all cases where error was alleged to have legal significance. In nearly every
application, relief grounded upon error was held to be available only if the party
resisting rescission knew or should have known of the assumption that proved
erroneous.\footnote{147}{See Bilbe, supra note 6, at 900, 943-47.}

As previously noted,\footnote{148}{See supra text preceding note 5.} present Article 1949 provides that “[e]rror vitiates
consent only when it concerns a cause without which the obligation would not
have been incurred and that cause was known or should have been known to the
other party.” This formulation clearly retains the substance of the article’s
antecedents, and the Louisiana State Law Institute’s comments to present Articles
1949 and 1950 state that these provisions do not change the law.\footnote{149}{See supra
text preceding note 5.} Accordingly, the courts have assessed error complaints asserted under the latter articles
pursuant to the analysis developed in the pre-revision cases.\footnote{150}{See infra
text accompanying notes 152-288.} However, present Article 1949 refers to error as to cause instead of error as to principal
cause, and the post-revision decisions often refer to cause instead of principal
cause in determining whether erroneous assumptions are legally significant.\footnote{151}{See infra
text accompanying notes 152-288.}

The following post-revision decisions include discussions of the requisites for
rescission.

In the 1988 decision in \textit{Valiulis v. L'Atelier Wholesale Antiques, Ltd.},\footnote{152}{519 So. 2d 312 (La. App. 2d Cir. 1988).} the Second Circuit concluded that pre-revision law technically was applicable to
an agreement entered before the revision’s January 1, 1985, effective date.
However, the court asserted that application of the new articles would not affect
its analysis.\footnote{153}{Id. at 315 n.1.} The controversy involved a buyer’s demand to rescind the sale
of an antique armoire. The trial court concluded that the principal cause of the
contract was the acquisition of an armoire that would fit physically and
aesthetically in the office in which the seller knew the item would be placed.\footnote{154}{Id. at 314.}

Because the buyer was found to have proven that the armoire was too large to
fit aesthetically in the room in question, the trial court rescinded the sale. On
appeal, the Second Circuit emphasized that the trial court’s decision could not be
affirmed unless the seller knew or should have known of the assumption
identified as a principal cause.\footnote{155}{Id. at 315.} The appellate court found manifest error in
the trial court’s conclusion that the seller had assured the buyer that the item
would fit aesthetically in his office. Although the seller had measured the
armoire and the wall identified by the buyer as the item's intended location, the office space was then under construction, and no furniture was on the premises. The buyer did not request the seller to view his other furniture, and he did not request his interior decorators to advise him concerning the suitability of the armoire prior to his purchase. The buyer did testify that he had been concerned that there would be adequate space for the armoire and his other furniture, but there was no testimony that he told the seller that he wanted his opinion concerning the armoire's aesthetic suitability for the office. The appellate court concluded:

[W]e determine that the testimony, when contrasted with the circumstances surrounding the transaction, does not support the trial court's determination that a principal cause of this contract has failed. The circumstances simply do not fit the codal prerequisites for error as to cause previously noted herein. It is our view that size was a cause only in the sense that the parties understood that the armoire must physically must fit in the office, rather than there being a guarantee that it was aesthetically appropriate for the office. In other words, our view of the record is that the plaintiff determined to purchase the item and was only concerned that it physically fit into his office, which it did.5

The court's resolution of the controversy was reasonably based. The buyer did not bargain for an arrangement expressly permitting him to return the item if he found it unsatisfactory, and the court of appeal concluded that the seller made no representation upon which rescission could be granted. In the absence of other circumstances warranting relief, it is understandable to emphasize that an assumption cannot provide basis for rescission unless its existence was known or should have been known by the party seeking to uphold the agreement. However, it seems unnecessary and possibly inaccurate to characterize the buyer as having been concerned only that the item "physically fit into his office."159 The armoire was a large expensive piece of furniture, and the seller had visited the buyer's office to determine whether there was sufficient space to display it in a prominent location identified by the buyer. In these circumstances, it seems reasonable to acknowledge that the buyer believed the armoire would complement the office and its furniture and furnishings. Because the court believed rescission to be inappropriate, it was not inclined to characterize the buyer's assumptions so that they arguably might have legal significance. However, the concept of error as to cause does not require that an assumption be recognized as a basis for rescission simply because its existence was known to the party seeking to uphold the contract. There are circumstances,

156. Id.
157. Id.
158. Id.
159. Id.
including those involved in Valiulis, where the risk of inaccuracy of an assumption should be allocated to the party seeking rescission even though the party resisting rescission knew that the assumption was being made.\footnote{160}

*Bordelon v. Kopicki*\footnote{161} and *Smith v. Remodeling Service, Inc.*\footnote{162} involve refusals of relief in circumstances where the parties resisting rescission neither knew nor had basis for knowing of the assumptions at issue. In *Bordelon*, a 1988 decision of the Third Circuit, parties who had contracted to purchase a residence situated on a corner lot refused to go forward with the transaction when they discovered that a municipal right of way paralleling one of the existing streets extended approximately thirty feet onto the property. Prior to signing the agreement to purchase, the purchasers had made arrangements with a contractor to have a bedroom added to the existing structure, but they never advised the sellers of their intention to make this addition. The sellers were aware that renovations were planned, but they had no knowledge of their nature and extent. The trial court rendered a judgment for damages in favor of the sellers despite the buyers’ assertion that the agreement should be rescinded for error. Emphasizing that a party must “either know or be presumed to know” of an assumption before it can be identified as a principal cause, the Third Circuit affirmed.\footnote{163} It observed that the record supported the buyers’ contention that they would not have contracted if they had known that a right of way thwarted their construction plans. However, the court also emphasized that the record did not indicate any basis for the sellers to have known that the enlargement of the residence was the buyers’ principal cause. The court observed:

> From the nature of this transaction it cannot be presumed that the plaintiffs knew what the [defendants’] principal cause was. The apparent reason for agreeing to buy a house and lot is to acquire a suitable place to live. The evidence establishes that the property in dispute fit that description. We do not believe that the [plaintiffs] should be held to have known that the [defendants] wanted to convert the residence into a four bedroom home, and that their planned addition would spill over into the right of way.\footnote{164}

If the right of way had thwarted only the buyers’ undisclosed construction plans, it would have been reasonable to identify Article 1949’s\footnote{165} knowledge requirement as the basis for denying rescission. However, unlike zoning ordinances or building restrictions, the right of way did more than preclude construction. It also subjected the buyers to the risk that a thirty foot strip of

160. See infra note 379 and text accompanying notes 378-385.
161. 524 So. 2d 847 (La. App. 3d Cir. 1988).
162. 648 So. 2d 995 (La. App. 5th Cir. 1994).
163. *Bordelon*, 524 So. 2d at 848.
164. *Id.* at 849.
165. See supra text following note 4.
lawn might be lost through the widening of an existing street. Further, if the controversy had been analyzed in terms of the significance of an undisclosed nonapparent servitude, a contrary decision might well have been rendered.\(^\text{166}\)

The Fifth Circuit's 1994 decision in \textit{Smith}\(^\text{167}\) involves a less controversial application of Article 1949's knowledge requirement. The purchasers of a home sought rescission and, alternatively, a reduction of price because the home's "living area" was 2,054 square feet and not 2,547 square feet as they believed it to be.\(^\text{168}\) The trial court and the court of appeal rejected all contentions that there had been misrepresentations as to the size of the living area by the seller or by any party whose representations were imputable to him. However, the record clearly established that the purchasers believed the house's living area to be 2,547 square feet when they contracted to purchase and when they subsequently executed an act of sale.\(^\text{169}\) The seller knew that 2,054 was the correct living area and that 2,547 was the total area under roof including garages and porches.\(^\text{170}\) The buyers' belief concerning the size of the living area resulted from an erroneous entry of the 2,547 figure as the living area in a real estate publication. The entry had been made during a period when the seller had a listing arrangement with a realtor. This listing was expired when the buyers and the seller entered their agreement, and the appellate court concluded that there was no evidence "to indicate that the seller knew or should have known that the plaintiffs had been misinformed about the living area."\(^\text{171}\) The court concluded that the "plaintiffs' motive in purchasing the home was to acquire a suitable and adequate place in which to live" and found that "the residence fit that purpose." It accordingly affirmed the trial court's refusal to rescind the transaction.\(^\text{172}\)

If the court properly concluded that the seller was not responsible for the buyers' erroneous belief as to the square footage, the decision certainly was correct. As a norm, sellers unquestionably are entitled to assume that buyers are aware of the size of the structures they are purchasing. Further, the evidence indicated that the home had a market value at least equal to the purchase price.\(^\text{173}\) Hence, the buyers' willingness to pay the agreed price did not suggest the existence of their assumption concerning the living area of the property. Accordingly, application of Article 1949 required that the buyers' claims be rejected.

Interesting questions involving Article 1949 have arisen in disputes concerning motor vehicles that were damaged in collisions and sold following

\(^{166}\) It could have been concluded that the sellers should have known that the buyers might be unwilling to purchase residential property burdened by the servitude in question.

\(^{167}\) 648 So. 2d at 995.

\(^{168}\) \textit{Id.} at 997-98.

\(^{169}\) \textit{Id.} at 999.

\(^{170}\) \textit{Id.}

\(^{171}\) \textit{Id.}

\(^{172}\) \textit{Id.}

\(^{173}\) \textit{Id.} at 998.
repair. In a 1987 decision regarding a pre-revision transaction, the Fifth Circuit in *Boteler v. Taquino*174 cited Articles 1949 and 1950, as well as their antecedents, in concluding that damage and repair unknown to both buyer and seller provided no basis for rescission. According to the record, the buyer asked the seller whether the automobile ever had been involved in an accident. The seller responded that he recently had acquired the vehicle and that it, to his knowledge, never had been wrecked.175 The buyer thereafter purchased the car without having it inspected. Within a week of the sale, he experienced mechanical problems, and a mechanic, in the course of an examination of the vehicle, discovered that it had been wrecked and repaired. Subsequent investigation revealed that the car had been involved in two "major" accidents. Alleging the continuing existence of a number of significant defects, the buyer brought an action in redhibition. He also contended that the seller’s representation that he had no knowledge of an accident should be treated as an unequivocal assertion that no wreck had occurred. Additionally, he sought relief based upon the contention that he would not have purchased the vehicle if he had known of the accidents.176

Because the buyer had failed to introduce evidence of the defects he alleged to exist, the court approved the trial court’s denial of relief grounded upon redhibition. Further, the court refused to equate the seller’s truthful representation that he had no knowledge of an accident with a positive assertion that no collision had occurred. The contention that error as to the occurrence of the accidents provided basis for rescission was rejected without hesitation.

The court acknowledged the buyer’s concern that the vehicle might have remaining damage but concluded that proof of the collisions did not constitute proof of existing defects.177 The court also differentiated the situation from the controversy in another appellate case where the seller knowingly sold a vehicle that had been involved in a significant collision without divulging this information.178 Finally, the court distinguished an appellate case involving the sale of a demonstrator vehicle with less than three thousand miles by a dealer who knew or should have known that the car had been wrecked.179 The instant situation was contrasted as the sale of a five year old automobile with substantial odometer mileage by a party who had himself purchased for personal use and who neither knew nor had reason to know the car’s history.180 In these circumstances, the buyer’s assumption that the car had not been wrecked, even though known by the seller, was not regarded as basis for rescission.181
Louisiana legislation requiring certain repaired vehicles to be designated as "reconstructed" has led to interesting questions regarding Article 1949 cause identifications. Under present law, a rebuilt "salvage" vehicle must be identified as a "reconstructed" vehicle on the title certificate issued following its restoration to operating condition.\(^{182}\) A salvage vehicle is one purchased for salvage value after it has been adjudged a total loss, and a total loss exists if there has been damage equaling at least seventy-five percent of the vehicle's market value.\(^{183}\)

In 1989, in *Lake Charles Auto Salvage, Inc. v. Stine*,\(^{184}\) the Third Circuit considered a purchaser's contention that he was entitled to rescind the sale of a "reconstructed" vehicle because he had been unaware of its classification at the time of the transaction. The corporate seller, as its name suggests, was in the automobile salvage business, and its employees had performed the repairs that resulted in the car's "reconstructed" classification. The seller was never asked whether the car was a "reconstructed" vehicle, and its representatives did not volunteer this information.\(^{185}\) However, the seller's representatives made no effort to conceal the occurrence of repairs. The vehicle was being repaired when it was first seen by members of the purchaser's family, and they were told that it had been damaged in the right front and that repairs had included replacement of the radiator and the air conditioning condenser.\(^{186}\) The existence of the "reconstructed" designation was discovered after the vehicle had been delivered to the buyer.\(^{187}\)

The buyer contended that his assumption that the car was not a "reconstructed" vehicle should be identified as a principal cause because he would not have purchased if he had known of the classification.\(^{188}\) The court of appeal, assuming arguendo that the buyer would not have purchased with knowledge of the car's designation, rejected the claim to rescission in the absence of "any evidence tending to show that the [seller] knew or should have known that this was a principal cause for [the buyer's] entering into the sales agreement."\(^{189}\) In the court's view, the seller should have understood the buyer's principal cause to be the purchase of a "car . . . that was mechanically and structurally sound, and reasonably safe to drive."\(^{190}\) Because the buyer failed to introduce any evidence of the car's alleged shortcomings and the seller introduced "substantial evidence . . . that the car was fully repaired and in good running condition," the

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184. 539 So. 2d 836 (La. App. 3d Cir. 1989).
185. Id. at 838-39.
186. Id. at 837.
187. Id. at 838.
188. Id.
189. Id. at 839.
190. Id. at 838.
court concluded that the buyer had failed to prove any error affecting principal cause.¹⁹¹

The opinion is also of interest as it distinguishes the 1986 decision in Cochran Ford, Inc. v. Copeland.¹⁹² In Cochran, the Second Circuit concluded that successive sales of a "reconstructed" automobile were both subject to rescission because of error as to principal cause. All parties to the litigation were automobile dealers.¹⁹³ The most recent purchaser brought suit against its vendor, and this individual asserted a like claim against the party who sold the vehicle to him. In each transaction, the purchaser learned of the "reconstructed" vehicle designation when the title certificate was furnished after the car's delivery. The three year old automobile was sold for $5,500 in its last transfer in 1984, and an expert witness testified that the presence of the designation on the title certificate reduced the car's market value by $2,000 to $2,500.¹⁹⁴ The Second Circuit concluded that there was error as to the principal cause from a dealer's "standpoint because the reconstructed vehicle title decreased the car's market value and thwarted the dealer's ability to resell the used car at a profit."¹⁹⁵ Accordingly, both sales were rescinded.

In Stine, the Third Circuit differentiated the Cochran case on two bases. The court first noted that the record in the pending litigation contained no evidence that the vehicle was purchased for resale or that its market value was affected adversely by the "reconstructed" classification.¹⁹⁶ Additionally, the court emphasized that the buyer, unlike the purchasers in Cochran, acquired the vehicle from a salvage dealer.¹⁹⁷

Both of the court's bases for differentiation provide support for its conclusion. However, the enactment of the statute requiring the identification of "reconstructed" vehicles indicates a legislative intention to alert vehicle purchasers of the occurrence of significant damage and reconstruction. Accordingly, this legislation itself could provide justification for recognizing an unknown "reconstructed" designation as basis for rescission under Article 1949. However, in a situation where a purchaser is aware of significant reconstruction but is unaware of the designation, there is little basis, apart from the statute prescribing the designation, for decreeing rescission. There remains the possibility that a vendor who reveals the occurrence of a collision might fail to share information concerning the magnitude of the damage. The purchaser in Stine, for instance, asserted but was unsuccessful in proving that he had been misled as to the extent of the damage that had been repaired.¹⁹⁸ Because such

¹⁹¹ Id.
¹⁹² 499 So. 2d 509 (La. App. 2d Cir. 1986).
¹⁹³ Id. at 512-13.
¹⁹⁴ Id. at 510.
¹⁹⁵ Id. at 512.
¹⁹⁶ Stine, 539 So. 2d at 839.
¹⁹⁷ Id.
¹⁹⁸ Id.
misrepresentations may occur and because a seller normally should be aware that a purchaser might be unwilling to purchase a "reconstructed" vehicle, it would be rational as a general rule to permit rescission in cases where a purchaser was unaware that a vehicle had been "reconstructed."

On the other hand, in the situation presented in Stine, there was no proven suppression of information unless the failure to reveal the "reconstructed" designation is so regarded. Further, the court regarded the buyer's error as to the existence of the vehicle's classification as insufficient basis for rescission because the vehicle was known to have been repaired by a salvage dealer. Similarly, the absence of evidence indicating that the "reconstructed" classification diminished the vehicle's market value certainly is relevant in determining the impact of the buyer's error upon the price negotiated in the transaction. However, in view of the statutory provision requiring the designation of the "reconstructed" condition and the magnitude of the reconstruction requisite to this classification, it seems preferable, as a norm, to regard the unknown status itself as basis for rescission. In this light, the court's resolution in Stine seems better justified by the seller's status as a salvage dealer than by the absence of any proof that the vehicle's classification reduced its market value. Additionally, it should be remembered that salvage dealers sometimes sell automobiles that are not salvage vehicles. Accordingly, a buyer's awareness of a seller's identity as a salvage dealer need not be regarded as a basis for denying rescission if an unknown "reconstructed" designation generally is to be regarded as a ground for rescission.

In any event, under legislation enacted in 1995, rescission has been made available whenever a transferor of a "reconstructed" motor vehicle fails to make a written disclosure of its classification. Accordingly, in situations involving undisclosed "reconstructed" titles, it is no longer necessary to establish error as to cause in order to obtain rescission.

The First Circuit's 1996 opinion in Franklin & Moore v. Gilsbar, Inc. discusses the requisites for rescission under Article 1949. In that case, a law firm brought suit against an insurance broker for the sum paid in addition to the premium originally remitted. The initial payment was made when the firm exercised an option to purchase an extended reporting period endorsement on a claims-made malpractice policy. The insurance broker originally quoted and received a premium of $18,766. Thereafter, two days before the expiration date of the original policy, the broker advised the firm that the premium had been miscalculated, that the correct premium was $33,602, and that the immediate payment of an additional $14,836 was necessary to effect the desired coverage. The broker also advised that individual malpractice insurance applications of two of the firm's attorneys could not be processed until the status of the firm's extended reporting coverage was determined. The firm then paid the additional

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200. 673 So. 2d 658 (La. App. 1st Cir. 1996).
premium "under protest" and brought suit to recover the amount of the payment.\textsuperscript{201}

The trial court found the broker's written quotations to constitute an offer to secure coverage for the sum of $18,766 and the remittance of that amount to be an acceptance obligating the broker to obtain coverage at the agreed price. Although the trial court described the miscalculation of the premium as error concerning the "principal cause" of the contract, it did not rescind the agreement. Instead, it rendered judgment in the law firm's favor for the amount of its additional payment plus interest. The trial court's oral reasons for judgment were not transcribed in their entirety, and the court of appeal accordingly could not ascertain the exact basis for the rejection of the broker's claim for rescission. However, the appellate court readily inferred that the lower court had concluded that the law firm neither knew nor should have known that "the specific premium was a principal cause of the contract."\textsuperscript{202} The court then observed that the appeal did not involve factual disputes and turned its attention to the legal significance of the broker's error in calculating the premium initially charged.

After quoting Articles 1949 and 1950, the court continued:

The jurisprudence has established the rule that a contract may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, where the other party knew or should have known it was a principal cause. (citations omitted) [The insurance broker] admitted it made an error in quoting the premium for the firm's ERP coverage and claimed this error concerned a principal cause, without which it would not have agreed to provide coverage. The trial court agreed. [The insurance broker] further argued because [the law firm] knew or certainly should have known collection of the premium was its principal reason for entering the contract, article 1949 is applicable. (footnote omitted) This argument is disingenuous. [The insurance broker] stated "collection of premium" was the principal cause because anyone buying insurance would surely be expected to know collection of premium was the insurer's primary reason for entering into the agreement. But in fact, [the insurance broker] did not just want collection of premium, [the insurance broker] wanted a specific premium amount of $33,602; this was the principal cause of the contract. If [the insurance broker] did not get that specific amount, it was not willing to provide the coverage. But it could hardly expect [the law firm] to know collection of $33,602 was the principal cause when its own employee quoted a different amount—not once, but twice—not just orally, but in writing . . . \textsuperscript{203}

\textsuperscript{201} \textit{Id.} at 659-60.

\textsuperscript{202} \textit{Id.} at 660.

\textsuperscript{203} \textit{Id.} at 662.
As additional support for its conclusion, the court noted the absence of circumstances that might have alerted the law firm to the occurrence of the broker’s error. Further, in refusing to permit rescission on the basis of price miscalculations not known or knowable by the party seeking to enforce the agreement, the court ruled in accordance with the pre-revision jurisprudence. In a number of cases involving mistakes made in the formulation of bids, builders and other contractors consistently have been denied relief where they made mistakes in mathematical calculation or in assessing the costs of rendering performance.  

In every case where a party seeking to uphold an agreement had no reasonable basis for detecting that the price determination was flawed, the error was rejected as a ground for rescission. A contracting party’s assumption that his bid was sufficient to recover his costs and to provide a net return has never been identified as a principal cause providing basis for rescission. As previously discussed, there is basis for contending that present Article 1952 affords relief in some circumstances where rescission could not be granted under the terms of Articles 1949 and 1950. Article 1952 permits an award of damages to a party seeking to uphold a contract when rescission is granted to the other party on the basis of the latter’s “own error.” The courts’ prior refusals to regard error in price determination as basis for rescission, together with Article 1949’s requirement that the party resisting rescission know or have basis for knowing of the assumption in question, strongly suggest that a party who makes an error in price determination is not entitled to relief unless the other party knows or should know of the error. However, The Louisiana State Law Institute’s comment to Article 1952 implies that contractors who have erred in their price determinations are among those who might be granted rescission and held responsible for reliance damages. The court of appeal, however, did not consider the possible applicability of Article 1952 to the situation.

V. THE LOUISIANA POST-REVISION JURISPRUDENCE CONCERNING MISUNDERSTANDINGS

In this article, the term misunderstanding describes a situation where contracting parties have significantly different perceptions concerning the contractual commitments or other legal consequences to result from their transaction. The Louisiana appellate courts have utilized the revised legislation in resolving several interesting controversies within this definition. Once

205. See supra text accompanying notes 38-47.
206. See supra text following note 4.
207. See supra text accompanying notes 43-47.
more, the courts do not differentiate mistaken assumptions and misunderstandings.

In Progressive Bank and Trust Co. v. Vernon A. Guidry Contractors, Inc., a purchaser at a judicial sale brought suit to rescind the transaction because the adjudication included only thirteen of the sixteen items he thought he was purchasing. A total of sixteen items were offered for sale through three separate suits with identical parties and consecutive docket numbers. Prior to the bidding on any of these assets, a deputy sheriff provided prospective bidders with itemized lists identifying sixteen items to be offered for sale with their individual and total appraised values. The list, which had been furnished by the seizing creditor, did nothing to correlate the items with the particular law suits in which they had been seized. According to the sheriff, he initially sold the single item seized in the first numbered suit, then the two seized in the second, and finally the thirteen from the third. In the third suit, the sheriff did not announce that thirteen items were being sold. Instead, he read aloud all items to be sold. He also announced that bids would be taken on each of the items individually and then in globo and that the items would be sold either individually or in globo depending upon the method resulting in the higher price. The sheriff testified that, in each instance, he read the caption of the suit, the writ, and the advertisement before the bidding began. He also expressed opinion that these announcements clarified any misunderstanding that might have resulted from the distribution of the list.

The Court of Appeal for the First Circuit reversed the trial court and rendered judgment in the purchaser's favor. In its opinion, the sheriff could not distribute the list and then expect it to be disregarded. In the court's view, "[t]he importance of the visual must not be underestimated," particularly during lengthy readings when "attentions are likely to falter" and "bidders are not always able to hear or understand clearly what is being read." Accordingly, the sheriff was regarded as having contributed significantly to the buyer's belief as to the identity of the goods being sold, and the court readily concluded that rescission was available. It stated:

It is clear that there was no meeting of the minds on the thing sold, and therefore a sale was never perfected.

Viewed from another perspective, [the purchaser] was in error regarding the object of the contract. Error vitiates consent, and consequently gives grounds for nullity, "only when it concerns the cause without which the obligation would not have been incurred and that

208. See Bilbe, supra note 6, at 900.
209. 504 So. 2d 997 (La. App. 1st Cir. 1987).
210. Id. at 998-1000.
211. Id. at 1000.
212. Id.
213. Id.
214. Id.
cause was known or should have been known to the other party.” LSA-C.C. art. 1949. Error as to the thing that is the object of the contract is error to a cause.\textsuperscript{215}

In 1991, in \textit{Woodard v. Felt}\textsuperscript{216}, the Second Circuit overturned a judgment that had recognized a contract despite the defendant’s contention that he had not intended to incur a contractual commitment. The plaintiff, a forester, asserted that he had been engaged to provide the professional services needed in marketing the defendant’s standing timber. In his view, the defendant had authorized him to select the trees to be cut, to estimate the yield of the projected harvest, to solicit bids from prospective purchasers, and to oversee logging operations in the event of a sale.\textsuperscript{217} The defendant, a seventy-five year old land owner without previous experience in such transactions, testified that he had intended only to authorize the plaintiff to prepare an estimate of the quantity of merchantable timber located on the property. Consistent with this assertion, he, unbeknownst to the plaintiff, had consulted another forester concerning provision of the services the plaintiff intended to perform. The defendant’s intention was to contract with the forester whose estimate indicated the existence of the larger quantity of timber.\textsuperscript{218} Nonetheless, the defendant admitted that he had authorized the plaintiff to mark all of the trees that were to be harvested.\textsuperscript{219}

The court of appeal identified two bases for reversing the trial court’s decision recognizing the existence and breach of a contract defined in accordance with the forester’s expectations. First, the appellate court concluded that the forester did not satisfy the evidentiary requirements for proving the contract at issue.\textsuperscript{220} Although it approved the lower court’s determination that the dispute concerned the provision of services and not the sale of standing timber, it disagreed with the finding that the alleged agreement, involving more than five hundred dollars, had been “proved by at least one witness and other corroborating circumstances.”\textsuperscript{221} The court of appeal acknowledged that a party to an agreement can be the “one witness” required by Article 1846, but ruled that the requisite “corroborating circumstances may not be the result of the plaintiff’s own actions.”\textsuperscript{222} On this basis, the court rejected the plaintiff’s

\begin{landscape}
\begin{itemize}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} 573 So. 2d 1312 (La. App. 2d Cir. 1991).
\item \textsuperscript{217} \textit{Id.} at 1314.
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.} at 1316.
\item \textsuperscript{220} \textit{Id.} at 1315.
\item \textsuperscript{221} \textit{Id.} La. Civ. Code art. 1846:
\begin{itemize}
\item When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.
\item If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances.
\end{itemize}
\item \textsuperscript{222} \textit{Woodard}, 573 So. 2d at 1315.
\end{itemize}
\end{landscape}
contention that his marking of defendant's trees fulfilled the statutory requirement.

Additionally, the appellate court found that there was no "meeting of the minds." It expressed its opinion that the "actions of each party subsequent to the first meeting [of the parties] are entirely consistent with each party's perception of the agreement between them, but totally inconsistent with a completed contract."\(^{223}\) The parties' misunderstanding also was described as "error as to the cause of the contract which vitiated consent" under Articles 1949 and 1950.\(^{224}\)

Despite the identification of alternative bases for denying recognition of the contract perceived by the forester, the court recognized a recovery in his favor on the basis of detrimental reliance. Citing Civil Code article 1967\(^{225}\) as authority, the court commented upon its options in formulating a remedy:

The court may grant either specific performance or damages. The timber has already been cut and sold so that damages in [sic] the only appropriate remedy available to the disappointed promisee. Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived. (citation omitted) However, the court need not award both of these elements of damages, but may limit recovery to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise.\(^{226}\)

The court's decision is noteworthy for several reasons. First, research has revealed no other appellate decision permitting recovery under Article 1967 in circumstances where the complaining party failed to satisfy the evidentiary requirements for proving the existence of a contract.\(^ {227}\) If the court's position becomes accepted in the case of oral contracts requiring "corroborating

\(^{223}\) Id.
\(^{224}\) Id. at 1316.
\(^{225}\) La. Civ. Code art. 1967:

Cause is the reason why a person obligates himself.

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

\(^{226}\) Woodard, 573 So. 2d at 1316.
\(^{227}\) Morris v. Friedman, 663 So. 2d 19 (La. 1995) is the most recent case on point. In that decision, the Louisiana Supreme Court held that the writing requirement of Louisiana Revised Statutes 10:8-319(a), for the sale of investment securities precluded recovery for detrimental reliance upon an oral promise made prior to the effective date of Louisiana Civil Code article 1967. The court ruled that a legislatively imposed "form requirement" foreclosed the possibility of a reliance based recovery. Id. at 25. However, it noted that the enactment of Article 1967 might "alter this analysis" but expressed "no opinion" whether the application of that article "would yield a different result." Id. at 25 n.11.
circumstances,” similar arguments certainly will be advanced concerning contracts that statutorily are required to be in writing.

The decision’s discussion of the possibility of awarding expectation damages is also of interest. It is doubtful that the court seriously considered awarding such damages despite the existence of an unfulfilled evidentiary requirement. Such an award would have exceeded the recovery needed to compensate the forester for his reliance and would have rendered Article 1846’s evidentiary formalities meaningless.

It is also unlikely that the court seriously considered the possibility of expectation damages notwithstanding the land owner’s belief that no contract was being formed. Rendering such an award would have undermined the determination that a misunderstanding precluded the recognition of a contractual relationship, and the court clearly believed that the land owner should not be obligated contractually in accordance with the perceptions of the forester. Nonetheless, the land owner admitted that he had authorized the forester to mark the entirety of the trees to be severed, and the court concluded that this authorization provided justification for the forester’s belief that he had been awarded a contract. In this situation, the court’s recognition of a reliance based recovery provided a reasonable accommodation of the interests of both parties.

In *Kethley v. Draughon Business College, Inc.*, the litigants initially believed that they had a legally enforceable agreement, but they subsequently discovered that they disagreed as to the compensation to be paid for plaintiff’s services. Prior to the dispute giving rise to the litigation, plaintiff had taught a course entitled Legal Research I in defendant’s paralegal program for a compensation of $200 per month. Thereafter, defendant’s paralegal program director asked plaintiff to teach Legal Research I and Legal Research II, which were scheduled for different time periods, in the upcoming quarter. Plaintiff and the director did not discuss compensation, but plaintiff testified that he believed he would receive $200 per month per course because he had received $200 per month for the course he had instructed. Subsequently, plaintiff was asked to teach both classes during the same time period, and he acquiesced. He taught both courses in this format until his first payday. Plaintiff assumed that he would be paid $200 because the payday was the occasion for payment of one-half of an employee’s monthly compensation, and he believed he was being paid $400 per month. However, he received only $100. After inquiry, plaintiff was advised by defendant’s academic director that he was teaching a “combined class” and that he would receive the same amount for teaching both courses in a combined format as he had received for teaching the single course in the prior

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228. *Woodard*, 573 So. 2d at 1316.
229. 535 So. 2d 502 (La. App. 2d Cir. 1988).
230. *Id.* at 503.
231. *Id.*
Plaintiff, in expressing his disagreement, emphasized that his teaching involved two sets of student assignments, two sets of lectures, and the teaching of two groups of students. According to plaintiff, the academic director then stated that she assumed that he would not continue under this arrangement, and he did not reply. Plaintiff testified that he then consulted the academic director’s supervisor who, after promising to look into the matter, communicated no further with him. Defendant appointed another instructor to teach the courses, and plaintiff brought suit for $1,100, the difference between the sum he thought he was going to be paid for teaching the entirety of both courses and the $100 he actually received at the end of the first pay period.

Defendant denied that it had agreed to pay the plaintiff $200 per course per month. While admitting that plaintiff had been paid $200 per month for the course he instructed during the previous period, defendant’s academic director denied telling him that the school paid $200 per course when he accepted his initial appointment. The academic director also asserted that the school’s policy was to pay $200 per “contact hour” and explained that contact hours are based upon the hours that an instructor actually spends in the classroom. However, this witness acknowledged that she did not recall discussing this policy with plaintiff. Further, she admitted that no one other than plaintiff’s replacement was teaching in a combined class format at the time of the trial. It also was established that all instructors who were teaching two sections of a single course during different time periods were being paid $400 per month.

The trial court awarded plaintiff judgment for $1,100. The defendant, contending that there was no “meeting of the minds” as to compensation, appealed. The court of appeal began its analysis by asserting that “[c]onsent of the parties is necessary to form a contract,” and by noting that the parties had not discussed plaintiff’s compensation for teaching in the combined class format. The court found the record to establish that the parties had intended different rates of compensation. The court stated:

In a nutshell, it seems obvious that the plaintiff expected to receive $400 per month (although he was teaching one-half the time originally agreed to) because he was teaching two courses. It seems equally obvious that the defendant planned to pay only $200 per month (although the plaintiff was teaching two courses) because the class (contact) hours were reduced by one-half.

232. Id. at 503-04.
233. Id. at 504.
234. Id.
235. Id.
236. Id.
237. Id. at 505.
238. Id.
239. Id.
240. Id.
Clearly, there was no meeting of the minds as to the rate of compensation, and any finding to the contrary which may be implicit in the trial court opinion is clearly wrong.\(^2\)

After finding that there was no contract to support the judgment rendered for plaintiff, the court nonetheless found basis for an award in his favor. It noted that defendant had “promised to employ the plaintiff to teach two courses” and asserted that this promise resulted in “a reasonable expectation by the plaintiff that he would receive more than he received for teaching one course.”\(^2\) On this basis, the court concluded that plaintiff relied on a promise to his detriment and that he was entitled to recover his damages under Article 1967.\(^2\) The court concluded that he should be compensated for his efforts in preparing research projects and lesson plans for his new course and for teaching both courses for two weeks. Accordingly, the court awarded $500 for these activities subject to a credit for the $100 sum he actually received.\(^2\)

In *Franklin State Bank & Trust Company, Inc. v. Herring*,\(^2\) the Second Circuit considered competing assertions concerning the amount of a borrower’s indebtedness. The lender contended that the borrower had agreed to pay interest at a variable rate of 2.5 points above the lender’s “Prime” rate through 84 equal fixed monthly payments together with any further monthly payments necessary to extinguish additional interest resulting from increases in the prime rate.\(^2\) The borrower asserted that she understood her commitment to entail only the 84 payments she had made.\(^2\)

The promissory note prepared by the lending bank provided that it was “[p]ayable in 84 monthly payments of $239.98 including interest beginning June 5, 1983 and monthly thereafter until paid in full.”\(^2\) The note further provided that interest at the rate of “FSB Prime + 2.5 per cent per annum” would be paid from date on the principal sum of $13,160.\(^2\) Additionally, near the bottom of the page, the note was stamped in ink over its pre-printed provisions. The stamped provision was illegible in part.\(^2\) Nonetheless, in the court of appeal’s opinion, it “suggest[ed] that something . . . about [the borrower’s] obligation on the note is ‘SUBJECT TO CHANGE ON A DAILY BASIS.’”\(^2\) The borrowing was secured by a chattel mortgage that, in identifying the borrower’s indebtedness, described it as payable in 84 monthly payments. The disclosure

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241. *Id.* at 506.
242. *Id.*
243. See supra note 225.
244. *Kethley*, 535 So. 2d at 507.
246. *Id.* at 644.
247. *Id.* at 645.
248. *Id.* at 645.
249. *Id.* at 644-45.
250. *Id.* at 647.
251. *Id.* at 647-48.
statement identified the annual percentage rate as "15.5" on one line and as "FSB Prime + 2.5 %" on the line beneath. The disclosure statement also described the amount financed as the amount identified in the note and in the chattel mortgage. However, it was blank as to the total of the payments to be made and as to the total finance charge to be incurred in the absence of pre-payment. The payment schedule on the disclosure statement described only the 84 equal payments and contained no language referring to the possibility that additional payments might be required.

The borrower testified that she was never told how the interest rate was to be computed, and the only witness called by the bank had not been involved in the transaction. Further, the bank offered no evidence to chronicle the changes in its prime rate, and its witness failed to "explain how or by whom the computation was made to determine that [the borrower] owed the bank $2,693.54 over and above the $20,158.32 she had paid over a seven-year period."

The court of appeal reversed the trial court's judgment in the bank's favor for the sum it alleged to be unpaid. The appellate decision neither reveals the lower court's basis for its decision nor discusses the factors that might provide support for the bank's position. In this regard, it is possible to read the initial language of the note as calling for further monthly payments if the 84 monthly payments have not amortized the indebtedness. Additionally, the note identifies a variable interest rate, and fixed sum payments will not service a variable rate indebtedness fully while the interest rate is above the rate for which the amortization payments are set. Further, the blanks in the financial disclosure statement as to the total amount of payments and the total finance charge support the bank's contention that the loan should have been understood as a variable rate transaction.

The court of appeal, however, believed that the borrower was justified in regarding the transaction to require only 84 payments. Accordingly, the court concluded that the bank's intention to enter a variable rate transaction did not affect the borrower under the terms of Article 1949. In the court's view, the borrower's expectations were entitled to protection unless she should have known that the bank would not have lent the principal without a commitment to make payments for a term that might exceed 84 months. Because the court was
convinced that the borrower had been reasonable in perceiving repayment to involve only an 84 month term, it reversed the lower court’s judgment in the lender’s favor. In the appellate court’s view, “the circumstances of this record and the duration of the asserted ‘error’” precluded the recognition of any commitment beyond the making of 84 fixed payments. Additionally, the court of appeal emphasized that the bank failed to establish that the borrower had paid less than she would have owed under the rates the bank intended to charge.

In Twin City Pontiac, Inc. v. Pickett, the Second Circuit considered a dispute regarding the price in a sale of a motor vehicle. The buyer had paid the entirety of the price specified in the contract document, and the seller had marked the buyer’s copy to indicate that full payment had been made. The buyer provided the seller with keys to the trade-in vehicle, and he was given possession of the new automobile. After his departure, a representative of the seller discovered that its computation of the price involved a $2,000 subtraction error in the buyer’s favor. The seller testified that immediate efforts to contact the buyer were unsuccessful but that its representatives were able to explain the situation to him when he delivered the title certificate to the trade-in vehicle three days later. The buyer admitted that the seller then explained its position and made its demand that he either pay an additional $2,000 or rescind the agreement. The buyer, refusing to alter the transaction, put the signed title certificate on a desk and left the seller’s premises. Thereafter, the seller brought suit for $2,000, the additional sum that allegedly would have been included in the price but for the error in calculation.

The seller contended that the parties had agreed to a $19,442 cash price to be reduced by a $1,000 manufacturer’s rebate. The seller asserted that the parties then agreed to assign a $2,700 value to the buyer’s trade-in vehicle and that both parties understood the pre-tax, pre-rebate price to be the remainder resulting from the subtraction of $2,700 from $19,442. It was further alleged that the salesman read the nine in the $19,442 figure to be a seven, and that he accordingly calculated a pre-tax, pre-rebate price of $14,742 instead of the $16,742 sum that accurate computation would have produced. There was further testimony that this $14,742 sum was utilized by the seller’s business manager, who computed license fees, sales tax, applied the rebate, and sold the buyer a service contract.

The buyer disputed the seller’s account of the bargaining process. He denied that he had agreed to use the $19,442 figure as the frame of reference in determining the price to be paid for the vehicle. He also contended that he never

262. Id.
263. Id.
264. 588 So. 2d 1125 (La. App. 2d Cir. 1991).
265. Id. at 1126.
266. Id. at 1128.
267. Id. at 1126.
examined the computations on which the seller relied and that the only relevant figure was the bottom line price including fees and taxes.\textsuperscript{268}

The trial court concluded that the parties had agreed to use $19,442 as the sum from which the trade-in allowance and the $1,000 rebate would be deducted.\textsuperscript{269} The court of appeal expressed its understanding of the lower court's determination:

The trial court apparently believed that [the buyer] was aware or should have been aware of the error in light of the originally quoted price of $19,442 and the subsequent discussions as to the value of his trade-in. The trial court accepted as a fact, based upon his perception of the credibility of the witnesses, that the $2,000 subtraction error occurred after [the buyer] knew of and had agreed to the quoted price of $19,442 less the rebate and trade-in allowance. We find no manifest error in the trial court's factual determinations.\textsuperscript{270}

Consistent with this conclusion, the trial court rendered judgment for the $2,000 sum it found to have been omitted in the calculation of the price. Because the buyer denied that he had expressed agreement utilizing the $19,442 figure, he contended that the transaction should be rescinded if it were not to be upheld at the price he had paid. The trial court's finding that he either knew or should have known of the omission of $2,000 from the agreed price, of course, largely undermined any basis for rescinding the transfer of the vehicle. If the buyer had actual knowledge of an arithmetical error, the transaction clearly should be enforced in accordance with the terms of an accurate calculation. If, on the other hand, it were concluded that the buyer lacked definite knowledge of the mistake in calculation, rescission in some circumstances might be appropriate despite the determination that the buyer had reason to know of the situation. In this regard, the relative positions of the parties as professional and consumer, the role of the dealer in the actual performance of the calculations, and the magnitude of a $2,000 increment in price are factors that normally might support a decision to decree rescission in lieu of a $2,000 augmentation of price. However, because the seller had offered the buyer an opportunity to rescind the transaction three days after its occurrence as an alternative to paying an additional $2,000, it was reasonable to deny rescission at trial ten months later when it was concluded that the buyer, at a minimum, had basis for realizing that a mathematical error had been made.

Further, in the opinion of the majority, rescission in the instant case could not be accomplished simply by returning the vehicle and restoring the purchase price. Because the vehicle had been driven and its market value had diminished, the majority asserted that a monetary adjustment in the seller's favor would be

\textsuperscript{268} Id. at 1127.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
necessary if rescission were decreed.\textsuperscript{271} In light of this analysis, the majority might have been expected to affirm the trial court’s award on the basis of its conclusion that the parties reached an agreement as to a specific sum to be reduced by a rebate and a trade-in allowance. Under this reasoning, the $2,000 judgment in the seller’s favor can be seen as an implicit reformation of the signed document to reflect the price that would have resulted from an accurate mathematical calculation.

Instead, the majority based its approval of the lower court’s decision upon Article 1952’s second paragraph.\textsuperscript{272} As previously observed, this provision permits a court to “refuse rescission when the effective protection of the other party’s interest requires that the contract be upheld.”\textsuperscript{273} The article additionally provides that “a reasonable compensation for the loss he has sustained may be granted to the party to whom rescission is refused.”\textsuperscript{274} The majority analyzed the situation as though the seller were seeking rescission of the transfer of the vehicle. It asserted that rescission would require the buyer to compensate the seller for ten months’ use of the vehicle and expressed opinion that the value of this use might well exceed $2,000. It then concluded that the “effective protection of [the buyer’s] interest requires that the contract be upheld” and that the $2,000 award “represents a reasonable compensation for the loss sustained by” the seller.\textsuperscript{275}

Because the seller was not seeking rescission, the applicability of Article 1952’s second paragraph can be questioned. However, the article does authorize a monetary adjustment to price in a situation where a transfer is upheld, and the provision would have provided a clear basis for the court’s affirmation of the $2,000 award if rescission actually had been sought. Further, the buyer may have preferred the payment of an additional $2,000 to rescission on terms requiring a more costly adjustment for the diminution in the vehicle’s value.

In \textit{Grace v. Zapata Off-Shore Co.},\textsuperscript{276} the Fourth Circuit examined competing contentions as to the terms of an ostensible agreement. The plaintiff asserted that the defendant had agreed to pay $150,000 to settle the former’s maintenance and cure claim. The defendant acknowledged that it had promised to pay this sum. However, it contended that the payment was to be made not only for the extinguishment of the claim for maintenance and cure but also for the plaintiff’s agreement to dismiss his appeal of a judgment in the defendant’s favor on the plaintiff’s claim for negligence. The plaintiff’s demand was based upon his counsel’s acceptance of a written proposal by defendant’s attorney. The letter in question described itself as an “offer” and stated that it would be “rescinded” if not accepted by an identified hour and date. It also provided: “As you are

\begin{itemize}
\item \textsuperscript{271} \textit{Id.} at 1129.
\item \textsuperscript{272} \textit{Id.} at 1128-29.
\item \textsuperscript{273} \textit{See supra} text preceding note 49.
\item \textsuperscript{274} \textit{See supra} text following note 4.
\item \textsuperscript{275} \textit{Id.} at 1129.
\item \textsuperscript{276} 653 So. 2d 704 (La. App. 4th Cir. 1995).
\end{itemize}
aware, our client has offered to settle [plaintiff's] maintenance and cure into the future for a total of $150,000.00.[.] This offer has been ‘on the table’ since the end of the trial on July 14, 1994." 277 Prior to the offer’s expiration date, defendant’s counsel received a letter advising of plaintiff’s acceptance of defendant’s “offer to settle . . . maintenance and cure into the future for a total of $150,000." 278

When it became apparent that the defendant would not make payment unless the appeal was dismissed, the plaintiff filed a motion to enforce settlement of the maintenance and cure claim, only, for the sum of $150,000. The trial court conducted a hearing that was limited primarily to argument of counsel. However, the record included a letter written by plaintiff’s counsel that supplied some support for defendant’s position. The letter was written six days after the trial of the negligence action and forty-eight days before defendant’s letter offering to settle for $150,000. After outlining the estimated cost of future maintenance and cure benefits and addressing defendant’s responsibility for past benefits, plaintiff’s counsel continued: “After your client has paid [plaintiff] the back due maintenance at the rate of an additional $15.00 per day I would like to be notified of this development. Thereafter, we can further discuss settlement of this case on the basis of a release of all claims for maintenance and cure as well as an agreement not to file an appeal.” 279

The trial court rejected the plaintiff’s demand. In the judge’s view, the defendant had intended to include the dismissal of the appeal in the settlement, although his “letter didn’t say that.” 280 Nonetheless, the court identified the defendant’s reference to the offer that had been “on the table” as a factor supporting its conclusion that there was no “meeting of the minds.” 281 A majority of a five judge panel of the court of appeal reversed. In the majority’s view, there was no ambiguity in either the defendant’s offer or the plaintiff’s acceptance. Accordingly, the exchange of communications was found to have resulted in a “clear and explicit” contract with provisions leading “to no absurd consequences.” 282 Article 2046 283 was then cited in support of the conclusion that parol evidence as to the parties’ intentions was inadmissible. Additionally, the majority expressed opinion that the settlement was on terms that rationally might have been agreed to by the defendant. It further asserted:

If [defendant’s] $150,000 offer was predicated upon the condition that [plaintiff] abandon his appeal of the judgment on the negligence claim,

277. Id. at 705.
278. Id.
279. Id. at 707 (Schott, C.J., dissenting).
280. Id. at 706.
281. Id.
282. Id.
283. La. Civ. Code art. 2046:

When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent.
it could and should have so stated. It did not. The offer, without the condition, was accepted within the allotted time, and [defendant] is now bound. What [defendant's] attorney may have meant to include in the offer, or what he wished he had included is irrelevant. Were we to hold otherwise where the terms of the offer are clear and unambiguous, and that offer is accepted, without modification by the offeree, no settlement agreement would ever be final. 284

In separate opinions, the two dissenting judges expressed their view that the matter should be remanded to the trial court for an evidentiary hearing. In the words of one of the dissenters, the attorneys should be given an opportunity to “testify under oath as to what they intended and what they thought they were doing.” 285 In this judge’s view, Article 1949 would provide basis for denying the existence of a contract if defendant could support its allegation “that the obligation to pay the $150,000 would not have been incurred except for a complete settlement of all claims and plaintiff knew or should have known this.” 286 The other dissenter believed that the defendant’s description of its offer as having been “on the table” since the trial was in itself basis for regarding the proposal to include the appeal’s dismissal. Accordingly, this judge concluded that a remand was necessary only to afford the plaintiff an opportunity to illustrate that defense counsel changed “his mind and his offer” between the time of trial and the date of his offer of settlement. 287

The decision is significant for two reasons. It illustrates the difficulty in determining the reasonableness of the respective perceptions of contracting parties, and it identifies the tension between the recognition of reasonably based contractual expectations and the protection of parties whose consent has been undermined by error. The majority’s view is representative of a number of Louisiana appellate decisions concerning situations where one party asserts an understanding that is readily supported by the language of a contract document and the other contends that he contemplated terms or consequences of which the first party had little or no reason to know. 288 The relationship between the parol evidence rule and the rules concerning the significance of vitiated consent is a topic unto itself. Because the cases discussed in this article primarily concern the revised articles on error, the impact of the parol evidence rule is considered only tangentially.

284. Grace, 653 So. 2d at 706.
285. Id. at 707 (Schott, C.J., dissenting).
286. Id.
287. Id. (Waltzer, J., dissenting).
VI. THE LOUISIANA JURISPRUDENTIAL CONCEPT OF INEXCUSABLE ERROR

The supreme court’s majority opinion in the 1987 case of *Scott v. Bank of Coushatta*\(^\text{289}\) is probably the first Louisiana appellate decision expressly identifying “inexcusable neglect” as the basis for denying a claim to rescission grounded upon “unilateral error.”\(^\text{290}\) The case concerned a lender’s effort to rescind a novation in order to enforce the commitment the novation had extinguished. The initial obligation was evidenced by a promissory note. The note was executed by parents in borrowing funds that were applied to the price of an automobile purchased by their adult son. Approximately one year later, the son decided to replace the vehicle, and the parents, who opposed the transaction, insisted that he pay or otherwise discharge their obligation. After discussions with the parents’ lender, the son signed a new note for a sum in excess of the principal owed on the first instrument. The lender required that this note be signed also by the son’s father, and the son, who agreed to procure his father’s signature, signed his father’s name without the latter’s knowledge or authorization. The second note bore the lender’s notation that it was executed to extinguish the first note.\(^\text{291}\) The first note was marked “paid” by the lender and was mailed to the parents.\(^\text{292}\) Nearly a year later, the lender notified the father of the approaching maturity of the second note. In response to inquiry resulting from this notice, the father learned of his son’s activities.

Despite the father’s assertions that he had not signed the second note and that he had not authorized his son to do so, the bank sought judgment against him on that instrument. It alternatively contended that the parents were liable on the first note if the father had not been obligated through the second transaction. The trial court found that the father had not signed the second instrument and that he had not authorized his son to act on his behalf.\(^\text{293}\) The court also concluded that the first note was discharged through the transaction involving the second instrument and that the liability of the parents accordingly was extinguished.\(^\text{294}\) The court of appeal affirmed the conclusion that the father was not obligated on the second note, but it rejected the lower court’s conclusion that the first note had been discharged through the execution of the second. In the

\(^{289}\) 512 So. 2d 356 (La. 1987).

\(^{290}\) The majority asserts that “error on the part of one party” cannot provide basis for rescission if the error results from that party’s “inexcusable neglect.” *Id.* at 361. At another point in its opinion, the majority states that the “Louisiana jurisprudence is sprinkled with cases which deny relief . . . because of unilateral error which is caused, in large part, by the complaining party’s inexcusable ignorance, neglect, or want of care.” *Id.* at 362. Additionally, it is said that “Louisiana cases have rejected the defense of unilateral error where the complaining party, through education or experience, had the knowledge or expertise to easily rectify or discover the error complained of.” *Id.* at 363.

\(^{291}\) *Id.* at 358.

\(^{292}\) *Id.*

\(^{293}\) *Id.* at 359.

\(^{294}\) *Id.*
appellate court's view, the second note was a renewal instrument that posed no obstacle to the enforcement of the initial obligation.\textsuperscript{295} Although the supreme court was divided as to the ultimate enforceability of the first note, there were no dissents from the majority's conclusion that the trial court correctly found the lender to have agreed to a novation.\textsuperscript{296}

The majority then turned attention to the lender's contention that the novation should be rescinded because of its assumption that the second note had been signed by the father as well as the son. After noting that a contract can be rescinded for error or fraud under both the Civil Code of 1870 and the revision, the opinion asserts that "error on the part of one party may not invalidate the agreement if the cause of the error was the complaining party's inexcusable neglect in discovering the error."\textsuperscript{297} The first case cited in support of this proposition was a decision of the United States District Court for the Eastern District of Louisiana.

That decision, \textit{Marsh Investment Corp. v. Langford},\textsuperscript{298} also involved a bank's suit to enforce indebtedness notwithstanding a novation agreement. The debtor had been sued on promissory notes she had executed to accommodate her son. Thereafter, the bank agreed to dismiss the suit and to cancel the notes in exchange for a new note to be executed by the son alone. This note was to be made for the total of the mother's indebtedness and all additional indebtedness owed to the bank by the son. It also was agreed that the instrument would be secured by a mortgage on property owned by a third party. After the transaction was executed, it was discovered that the son lacked authority to encumber the third party's property. The bank sought to rescind the transaction based upon the nonexistence of the contemplated security and the son's misrepresentations concerning his authority to secure the indebtedness.\textsuperscript{299} The mother contended that the bank's negligence precluded rescission of the novation.\textsuperscript{300}

The district court was unable to identify any Louisiana authority precisely on point. However, it found support for its denial of rescission in the law of redhibition and in the legislation and jurisprudence limiting rescission grounded upon misrepresentation in situations where the complaining party could have discerned the truth without difficulty, inconvenience, or special skill.\textsuperscript{301} In the court's view, Louisiana's pre-revision law did not afford rescission to a purchaser complaining of misrepresentations as to attributes of an item where he "had every reasonable opportunity to become informed about the facts and has failed to do so."\textsuperscript{302} The court also expressed opinion that Louisiana law, as a general

\textsuperscript{295.} Id.
\textsuperscript{296.} Id. at 359-61.
\textsuperscript{297.} Id. at 361.
\textsuperscript{299.} Id. at 883.
\textsuperscript{300.} Id.
\textsuperscript{301.} Id. at 884.
\textsuperscript{302.} Id.
proposition, requires a party seeking relief for fraud to “show a material misrepresentation of fact upon which that party had ‘a right to rely and actually did rely.’”\textsuperscript{303} The court concluded that the bank failed to make “the slightest inquiry into the nature, extent, and very existence” of the son’s purported authority to encumber the third party’s property and found that the bank “dealt with him at its risk.”\textsuperscript{304} After concluding that the bank had failed show that it had a right to rely on the son’s representations or, in the case of certain of the these representations, that there had been any reliance in fact, the court stated:

The Bank, schooled in financial dealings and fully assisted by counsel, chose to proceed in ignorance in this matter. (citation omitted) Such a conscious course of conduct under the suspicious circumstances of this case may properly be characterized under Louisiana law as gross fault or negligence. (footnote omitted) The result of the Bank’s failure to apprise itself of the facts behind [the son’s] patent misrepresentations can be laid at no doorstep except its own.

My decision to deny the Bank’s claim against [the mother] remains the same regardless of whether she is an innocent party in the restructuring transaction or “the beneficiary of her agent’s calculated fraud.” This case is dismissed not because [the mother’s] defense succeeded, or because the equities lie in her favor, but because the Bank failed to establish its right to the relief requested.\textsuperscript{305}

Although the district court did not utilize the term “inexcusable” in describing the bank’s failure to scrutinize the son’s purported authority to encumber the property in question, it classified the bank’s inactivity as “gross fault” and, in a footnote, observed that the Civil Code defines gross fault as fault “which proceeds from inexcusable negligence or ignorance.”\textsuperscript{306}

In addition to \textit{Marsh Investment Corp. v. Langford}, the supreme court’s majority opinion in \textit{Scott} identified several Louisiana state court decisions involving situations where rescission was resisted on the basis of alleged fault of the complaining party. Most of the cited decisions were first catalogued by Professor Vernon V. Palmer in a 1975 article concerning “contractual negli-

\textsuperscript{303} Id. (quoting LaCroix v. Recknagel, 89 So. 2d 363, 367 (La. 1956)).
\textsuperscript{304} Id. at 885.
\textsuperscript{305} Id. at 885-86.

\textit{Fault.—There are in law three degrees of faults: the gross, the slight, and the very slight fault.}

\textit{The gross fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud.}

\textit{The slight fault is that want of care which a prudent man usually takes of his business.}

\textit{The very slight fault is that which is excusable, and for which no responsibility is incurred.}
The majority, in line with Professor Palmer's view, asserted that the "jurisprudence indicates two prominent factors in the evolution of the contractual negligence defense:"

(a) Solemn agreements between contracting parties should not be upset when the error at issue is unilateral, easily detectable, and could have been rectified by a minimal amount of care.
(b) Louisiana courts appear reluctant to vitiate agreements when the complaining party is, either through education or experience, in a position which renders his claim of error particularly difficult to rationalize, accept, or condone.

Turning to the controversy at issue, the majority described the bank as having been faced with a "sea of red flags" in its dealings with the defendants' son. The court observed: the bank permitted the note to be removed from its offices for execution; it required no witnesses to the father's signature; both signatures on the note appeared to be made in the same handwriting; the father's signature card in the bank's possession indicated that the signature on the note was not genuine; the questionable validity of the signature was not noted at the time of the transaction; and no effort was made to consult the parents about the genuineness of the signature or the son's authority to obligate his father. The majority concluded: "In short, these lax banking practices preclude the Bank's now rescinding the novation."

Three justices dissented. All of the dissenters agreed that the bank had consented to a novation, but they also believed that the "lax banking practices" were no bar to rescission under the circumstances revealed by the record. One dissenting justice asserted, without elaboration, that the unauthorized signature justified rescission "regardless" of the bank's conduct in the transaction. Another justice, who regarded the bank as having "negligently cancelled" the note, contended that the negligence should have significance only if the parents "suffered damages in reliance on" the cancellation. In this justice's view, judgment should have been rendered in accordance with the terms of the original note in the absence of proof of detrimental reliance resulting from the cancellation. Although the justice found no such proof in the record, he expressed opinion that reliance damages "perhaps" should be regarded as basis for a pro

309. Id. at 363.
310. Id.
311. Id.
312. Id. at 364 (Marcus, J., dissenting).
313. Id. (Lemmon, J., dissenting).
314. Id.
tanto reduction of the original indebtedness and not as justification for refusing
to rescind the novation.315

The third dissenter stated:

Although I agree with most of the majority’s statement of legal
precepts, I disagree with its articulation and application of a rule which
precludes rescission of an obligation based on error or fraud because of
a party’s slight negligence. . . .

. . . .

Under previous Louisiana case law, as well as modern civilian
document, in determining whether to grant rescission or, when rescission
is granted, whether to allow any recovery to the party not in error, the
court may consider whether the error was excusable or inexcusable.
(citations omitted) Under the Civil Code, inexcusable negligence or
ignorance is the source of gross fault, which is considered as nearly
equal to fraud. (citation omitted) The court may also consider whether
the other party has changed his position and the importance of such a
change. In this context, Louisiana courts have said that in case of doubt
as to error in the motive of one of the parties, courts will lean heavily
in favor of one seeking to avoid loss and against one seeking to obtain
a gain. (citation omitted)316

The justice noted that the bank had done business with the father and the son
on prior occasions and had no reason to question the son’s honesty. The justice
then expressed his conclusion that the bank’s conduct, even if it constituted
negligence, clearly did not involve “inexcusable error or gross fault.”317 To the
contrary, in a situation where the father had not “changed his position or suffered
damage” and the bank sought only to avoid loss, the bank’s error was clearly
“excusable.”318

Research has identified no further decisions of the supreme court addressing
excusable or inexcusable error. Several decisions of the courts of appeal,
however, have involved situations in which one party resisted rescission through
contention that the other’s error was inexcusable. One of the most interesting is
the 1994 decision of the First Circuit in Massachusetts Indemnity & Life
Insurance Co. v. Humphreys.319

The controversy involved an insured who claimed proceeds under a rider to
a life insurance policy insuring her own life. The rider insured the life of the
insured’s husband, who was known by both the insured and the insurer to have
leukemia at the time the application for the rider was made. According to the

315. Id. n.1.
316. Id. at 365 (Dennis, J., dissenting).
317. Id.
318. Id.
319. 644 So. 2d 818 (La. App. 1st Cir. 1994).
insurer, the insured and her husband were aware that the desired coverage could be provided only if the husband's former wife, who also was an insured and who had an existing rider insuring her former spouse's life, would consent to the transfer of this rider from her policy to the policy of the insured. The insured contended that she had been advised that coverage could be effected without the necessity of the first wife's consent and that she only needed to supply a copy of her husband's judgment of divorce and two policy change forms executed in accordance with the insurer's instructions. One of these forms, however, clearly had been prepared for the first wife's signature. Approximately two months after the submission of an application that did not include the first wife's signature, a rider insuring the husband's life was received by the insured. On the day after the receipt of the rider, an officer of the insurer wrote the insured a letter asserting that the rider was "invalid and/or void from the date of issuance." The letter was accompanied by a check for the sum submitted by the insured with the insurance application. Although the insured had cashed the check, she made application for the proceeds of the rider after her husband's death approximately five months later. The insurer initiated an action for declaratory judgment to determine its responsibility. It asserted that the rider was "issued through mistake and clerical error" and that this error provided basis for relieving it of the commitments expressed in the document. It further contended that any rights that might have existed as a consequence of the issuance were extinguished through the negotiation of the refund check included with the letter explaining the insurer's position.

The district court concluded that the insurer was obligated by the issuance of the rider. It also ruled, in light of the insurer's representations as to the unenforceability of the rider, that the insured's negotiation of the check did not constitute "a knowing and voluntary waiver." The court of appeal affirmed these determinations. Addressing the contention that rescission should be available because the transaction did not have the first spouse's approval, the court simply stated: "[U]nilateral error does not vitiate consent if the cause of the error was the complaining party's inexcusable neglect in discovering the error." Scott v. Bank of Coushatta and a 1991 decision of the First Circuit were cited as authority.

The opinion included no further discussion of this issue.

320. Id. at 819.
321. Id.
322. Id.
323. Id. at 821. The quoted language is the trial court's characterization of the insurer's communication.
324. Id. at 820.
325. Id. at 821.
326. Id.
327. Id. at 820.
328. Scott, 512 So. 2d at 356.
If it is assumed that rescission would be available to the insurer under Articles 1949 and 1950 in the absence of factors rendering the error "inexcusable," it appears that relief would be afforded under the reasoning of at least two of the three justices who dissented in Scott. If, as one justice asserted, error becomes inexcusable only if the party resisting rescission has relied upon the transaction to his detriment, then the insurer's negligence should be no barrier to a decision in its favor. The insured's husband had been diagnosed as having a life threatening illness. Accordingly, his only prospect for obtaining significant insurance coverage required his former wife to relinquish her rights to the rider under which coverage already existed. There simply could not have been any reliance in the sense of refraining from efforts to procure comparable coverage through other insurers. Further, the insurer wrote the letter repudiating its commitment on the day after the rider was received by the insured. Thus, it is highly unlikely that the insured entered any transaction attributable to her belief in the existence of coverage before she learned of the insurer's repudiation. Under a concept in which error is "inexcusable" only if it results in detrimental reliance, the insurer's negligence would not preclude rescission.

It also appears that the insurer's negligence would not bar rescission under the view of the justice who would limit inexcusable error to error resulting from "gross fault." Because the Civil Code provision equating inexcusable negligence with gross fault also denominates the standard for actionable negligence as "slight fault," the justice reasoned that negligence not involving gross fault should not preclude rescission. Additionally, this dissenter asserted that the occurrence and extent of reliance should be considered in determining whether error is inexcusable. Accordingly, rescission should be available to the insurer under his analysis.

The insurer in the Humphreys case did not seek writs for the review of the court of appeal's decision. The supreme court's decision in Scott, however, does not compel the result reached in Humphreys. In the first place, the majority in Scott expressly refers only to "unilateral error" and "error on the part of one party" in describing circumstances where inexcusable error will preclude rescission. In Humphreys, the insured should have been aware that coverage would not be made available unless her husband's former spouse relinquished the existing insurance on his life. Accordingly, it can be argued that the insured should have known that the rider was issued on the assumption that the former spouse had agreed to give up her rights. On that basis, the situation could be characterized as one involving a shared assumption, and the concept of inexcusable error, a preclusion described in terms of unilateral error, would be inapplicable. Of course, the court could characterize the situation as an instance

330. Scott, 512 So. 2d at 364-65 (Lemmon, J., dissenting).
331. Id. at 365 (Dennis, J., dissenting).
333. Scott, 512 So. 2d at 365 (Dennis, J., dissenting).
334. See supra text accompanying notes 289-297.
of unilateral error, or it could rule that the concept of inexcusable error can encompass instances of shared error attributable to the fault of one of the parties.

If the majority in *Scott* regarded inexcusable error as a concept protecting expectations even in the absence of reliance, then it would be expected to approve the First Circuit's decision in *Humphreys*. If the only issue is fault concerning the error's occurrence, then the insurer in *Humphreys* appears at least as culpable as the bank in *Scott*. The insurer failed to confirm whether its own insured had executed a document it regarded as crucial to the transaction, and it issued a rider evidencing the existence of the desired coverage. The bank in *Scott* similarly caused parties to conclude that their son had paid or otherwise discharged their indebtedness. If it is inexcusable to trust a son to obtain his father's signature in order to novate the father's existing obligation, it must be inexcusable also for an insurer to issue a rider without first confirming that its prerequisites for coverage have been satisfied.

Despite the similarities of the situations in *Scott* and *Humphreys*, it is by no means certain that the majority in *Scott* would have approved the result in *Humphreys*. As previously suggested, the situation in *Humphreys* can be differentiated in that the insured, despite her perception that coverage had been effected, should have known that this result required the acquiescence of her husband's former spouse. Additionally, although the *Scott* majority makes no mention of reliance in justifying its decision, it was discussing a situation where nearly a year had elapsed between the parents' receipt of the cancelled note and the bank's subsequent effort to rescind the cancellation. There was no testimony that the obligors had entered any transaction they would not have entered if they had believed the indebtedness to remain in existence; however, the majority's decision could well have been influenced by the possibility of such reliance. Also, it is likely that the passage of time at some point will incline nearly every judge to deny rescission. Accordingly, the fact that the insurer's assertion of error was communicated within several days of the delivery of the rider could provide a reasonable basis for distinguishing the situation in *Humphreys* from the controversy in *Scott*.

The First Circuit also identified inexcusable error in its 1991 decision in *Woods v. Morgan City Lions Club*. In that case the court of appeal reversed a trial court determination that there had been no "meeting of the minds" and ruled that the plaintiff had been justified in perceiving an agreement. The court also rejected the defendant's contention that any such agreement should be subject to rescission grounded upon error. The plaintiff's claim was for the $10,000 "jackpot" in a bingo game in which she covered the last of the twenty-five spaces on her card on the fifty-second number called in the contest. The defendant, who had paid the plaintiff $1,000 as a consolation prize, asserted that the jackpot game had ended with the fifty-first number. The plaintiff's position

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335. 588 So. 2d 1196 (La. App. 1st Cir. 1991).
336. Id. at 1197.
was based primarily upon the Lions Club’s advertisement in a local newspaper describing a jackpot game with a maximum of fifty-two numbers. Despite the Lions Club’s contrary contention, the trial court found that the terms of the printed advertisement had been approved by a club member authorized to perform that function, and the court of appeal affirmed this finding. The appellate opinion does not reveal the basis of the trial court’s conclusion that an agreement had not occurred. In light of its determination concerning the authorization and terms of the advertisement, its decision may have been based upon testimony concerning announcements allegedly made prior to the occurrence of the jackpot game.

The court of appeal regarded the advertisement as an offer specifying the rules to be utilized in the jackpot game on the evening in question. Under the court’s analysis, a purchase of bingo cards by a contestant familiar with the advertisement “was sufficient to constitute acceptance” and resulted in “a valid and binding contract, under which [the plaintiff] became entitled to the promised rewards.” In this view, any announcements concerning the rules of the contest made after plaintiff’s purchase of her cards were efforts to modify contractual terms already in existence. Although there was conflicting evidence concerning the occurrence of announcements as to the duration of the jackpot game, there admittedly was no effort to alert contestants that the jackpot game would not be conducted in accordance with the terms expressed in the newspaper advertisement. On that basis, the court concluded that “as a matter of law the alleged notice concerning the number required to win the jackpot... was insufficient to apprise the plaintiff that the offer expressed in the advertisement was no longer valid.” In the court’s opinion, the Lions Club should have notified all participants, individually, of its intention to limit the jackpot game to fifty-one numbers when bingo cards were sold at the beginning of the evening.

The court of appeal then addressed the contention that any agreement based upon the advertisement was vitiated by error. The court began its analysis by citing Articles 1948 and 1949 and by emphasizing the latter article’s provision limiting legally significant error to assumptions that were known or should have been known by the party resisting rescission. Without discussing any of the factors that might have been relevant to the availability of rescission under these articles, the court continued: “Furthermore, unilateral error does not vitiate consent if the cause of the error was the complaining party’s inexcusable neglect in discovering the error.” The court then cited the Scott decision and quoted its language concerning the general inexcussability of easily detectable unilateral error. It next examined factors that could have supported both a determination...
that the club’s error was not a basis for rescission under Article 1949 and a conclusion that such error, in any event, was inexcusable. The court noted that the advertisement covered half of a newspaper page and found that the record supported the trial court’s conclusion that the club was responsible for its content.\footnote{Id.} The court also noted that the club members who oversaw the contests on the evening in question were unaware of the terms of the advertisement.\footnote{Id.} Additionally, it observed that the schedule for increasing the number of balls to be called in the jackpot game “was peculiarly within the knowledge of the Lions Club, and this policy was never communicated to the public.”\footnote{Id.}

The analysis concluded:

Because of these facts there is no way that plaintiff can be charged with contributing to the error. Furthermore, the unique circumstances of the case would naturally lead any person to assume that the numbers changed every other week. Under the facts and circumstances of this case, the Lions Club may not seek to void its contract with the plaintiff for unilateral error.\footnote{Id.}

The court clearly concluded that the club’s error was inexcusable. It is difficult to determine whether the court also regarded the club’s desire to limit the jackpot game to fifty-one numbers as an intention without significance under traditional error analysis.

Inexcusable neglect was identified as an alternative basis for denials of rescission in \textit{Smith v. Remodeling Service, Inc.}\footnote{648 So. 2d 995 (La. App. 5th Cir. 1994).} and \textit{Davis v. Rubenstein.}\footnote{535 So. 2d 812 (La. App. 2d Cir. 1988).} In \textit{Smith}, a 1994 decision of the Fifth Circuit discussed previously in this article,\footnote{See supra text accompanying notes 167-173.} the court concluded that a buyer’s erroneous assumption concerning the square footage of a home’s living area provided no basis for rescission. The court first identified factors providing basis for the rejection of the buyer’s claim under traditional error analysis. The buyer’s apparent “motive” for buying the house was identified as the acquisition of a suitable place to live, and the price paid was said to be fair in light of the market value of the structure.\footnote{\textit{Smith}, 648 So. 2d at 999.} Additionally, the court noted the absence of any evidence indicating that the seller knew or should have known that the buyers had been misinformed about the size of the living area.\footnote{Id.} Accordingly, the court had clear basis for rejecting the buyers’ demand for rescission without regard to the existence of any negligence on their part. Nonetheless, the court, after asserting that unilateral

\footnotesize{\textsuperscript{342.} Id.\textsuperscript{343.} Id.\textsuperscript{344.} Id.\textsuperscript{345.} Id.\textsuperscript{346.} 648 So. 2d 995 (La. App. 5th Cir. 1994).\textsuperscript{347.} 535 So. 2d 812 (La. App. 2d Cir. 1988).\textsuperscript{348.} See supra text accompanying notes 167-173.\textsuperscript{349.} \textit{Smith}, 648 So. 2d at 999.\textsuperscript{350.} Id.}
error resulting from inexcusable neglect affords no basis for rescission, observed that the purchasers "could have easily measured the residence prior to the sale to determine the actual living area of the home." Thus, the court seems to have regarded the buyers' neglect as an independent basis for its decision.

In the 1988 decision rendered in *Davis v. Rubenstein*, the Second Circuit affirmed a trial court's finding that an investor had no right to rescind his acquisitions of options to purchase silver. The investor contended that he had not understood the effect that his subsequent agreements to extend the duration of these options would have upon the price to be paid if the extended options were exercised. The record showed that the investor had experience in transactions involving stocks, commodities, real estate, and at least one prior forward silver contract. The evidence also showed that he received confirmations showing a new higher price to be paid for the silver in each instance when an option was extended. The court of appeal approved the trial court's finding that the complaining party had failed to establish error. The appellate court also asserted that any failure to understand the transactions resulted from the plaintiff's inexcusable neglect in discovering the error and accordingly provided no basis for rescission.

The concept of inexcusable error is considered in several other decisions of the Louisiana courts of appeal and the *Scott* decision receives attention in two cases decided by the United States Court of Appeals for the Fifth Circuit. Two of these decisions warrant discussion.

In 1991, in *Adler v. Parkerson*, Louisiana's Fifth Circuit affirmed a judgment rescinding an agreement to purchase residential property because of the purchasers' erroneous assumption that the property had been shored during recent renovations. The trial court found that the buyers would not have agreed to purchase the home if they had known that it had not been shored professionally and that the sellers knew or should have known that the buyers believed that the shoring had been accomplished. The sellers contended on appeal that the buyers were inexcusably negligent in failing to notice masonry cracks suggesting the need for shoring and in failing to verify the occurrence of the shoring.

351. *Id.*
352. *Davis*, 535 So. 2d at 812.
353. *Id.* at 814.
354. *Id.*
355. *Id.*
358. 581 So. 2d 1073 (La. App. 5th Cir. 1991).
359. *Id.* at 1075.
services by consulting the shoring company believed to have performed the work.\textsuperscript{360} It was contended that \textit{Scott} provided basis for denying rescission even though the sellers' representations communicated through their realtor were the source of the buyers' belief that the shoring had been accomplished by an identified shoring company.\textsuperscript{361}

The appellate court had no difficulty in rejecting the arguments grounded upon the supreme court's decision in \textit{Scott}. The court observed that \textit{Scott} had described inexcusable neglect in terms of easily detectable unilateral error and had identified experience and expertise as factors to be weighed in assessing culpability.\textsuperscript{362} In light of this guidance and in view of the realtor's testimony as to her observations concerning the property, the court found that the conditions indicating a current need for shoring were not easily detectable by those unfamiliar with construction.\textsuperscript{363} Because the sellers, at a minimum, should have understood that the buyers believed that professional shoring had been performed, the court also rejected the sellers' characterization of the buyers' error as unilateral.\textsuperscript{364} Additionally, the court asserted that a party "who has misrepresented the facts is not in the position of the innocent party against whom rescission is sought for a unilateral error."\textsuperscript{365} Accordingly, the sellers' reliance upon \textit{Scott} was found to be misplaced.

In the 1993 case of \textit{Illinois Central Gulf Railroad Co. v. Land, Inc.},\textsuperscript{366} the United States Court of Appeals for the Fifth Circuit considered a contention that inexcusable negligence precluded reformation grounded upon mutual error. The court rejected the argument. It examined the cases beginning with \textit{Scott} and concluded that the recognition of contractual negligence as a defense to "actions for rescission based on unilateral error" did not indicate that the concept "also applies to reformation actions based on mutual error."\textsuperscript{367} In support of its conclusion, the court noted that the Louisiana State Law Institute comment to Article 1952 concerning inexcusable error refers only to actions for rescission.\textsuperscript{368} Additionally, the court was unable to locate a Louisiana appellate case recognizing contractual negligence as a bar to reformation in circumstances where mutual mistake had been established. Furthermore, \textit{Meyers v. College Manor},\textsuperscript{369} a 1991 decision of the Third Circuit, was identified as a case where reformation was decreed in favor of a party who had not read the document in

\textsuperscript{360} Id.
\textsuperscript{361} Id.
\textsuperscript{362} Id. at 1075-76.
\textsuperscript{363} Id.
\textsuperscript{364} Id. at 1076.
\textsuperscript{365} Id.
\textsuperscript{366} 988 F.2d 1397 (5th Cir. 1993).
\textsuperscript{367} Id. at 1405.
\textsuperscript{368} Id.
\textsuperscript{369} 587 So. 2d 820 (La. App. 3d Cir. 1991).
question. Finally, after noting that the Restatement permits reformation despite 
failurc to examine a writing,370 the court concluded that contractual negligence 
did not preclude reformation grounded upon mutual mistake.371

VII. A COMPARISON OF THE LOUISIANA LAW OF ERROR AND THE 
RESTATEMENT PROVISIONS CONCERNING MISTAKE

A. Mistaken Assumptions

1. Article 1949 and Section 152

Civil Code article 1949 and Restatement section 152 have common 
denominators. Under Article 1949, an erroneous assumption provides basis for 
rescission "only when it concerns a cause without which the obligation would not 
have been incurred and that cause was known or should have been known to the 
other party."372 Section 152 of the Restatement similarly recognizes a "mistake 
of both parties . . . as to a basic assumption" as a ground for avoidance if the 
mistake had "a material effect on the agreed exchange of performances" and the 
complaining party did not bear the "risk of the mistake."373

In most cases, the factors underlying a decision to grant rescission under 
Article 1949 would justify the identification of a basic assumption that materially 
affectcd the agreed exchange of performances.374 Further, a decision to grant 
relief under Article 1949 itself involves a determination that the complaining 
party should not bear the risk of the inaccuracy of the assumption at issue.375 
For example, in the 1986 decision in Cochran Ford, Inc. v. Copeland,376 a 
Louisiana court of appeal rescinded successive sales of an automobile because the 
parties did not detect its classification as a "reconstructed" vehicle. The 
reconstructed designation resulted from the vehicle's earlier involvement in an 
accident for which repair costs had been estimated to equal at least seventy-five 
percent of the automobile's market value. Under the pertinent statutory 
provisions, such a vehicle must be designated as reconstructed on its title

371. Land, 988 F.2d at 1406.
372. See supra text following note 4.
373. See supra text following note 54.
374. See supra text accompanying notes 4-49, 51-79.
375. In order to provide basis for relief under the concept of error as to cause, an assumption 
must have been integral to the complaining party's expression of commitment, and the party resisting 
rescission must have known or have had reasonable basis for knowing of the assumption and its 
significance. However, not every such assumption is required to be recognized as a cause. In 
determining the appropriateness of rescission, the Louisiana courts may weigh all factors affecting 
the availability of avoidance under the terms of Restatement section 152.
376. 499 So. 2d 509 (La. App. 2d Cir. 1986) (discussed supra in text accompanying notes 192- 
199).
certificate if it is repaired and restored to operation. The court concluded that the unknown existence of the reconstructed classification affected “principal cause” from an automobile dealer’s “standpoint because the reconstructed vehicle title decreased the car’s market value and thwarted the dealer’s ability to resell the used car at a profit.” Because market value was reduced markedly by the vehicle’s classification, a court guided by the Restatement should have little difficulty in finding the parties’ error to have involved a basic assumption that materially affected the agreed exchange of performances. Similarly, a court concerned with the unanticipated disparity between agreed price and market value would not be expected to allocate the risk of the mistake to the purchaser.

Because of Article 1949’s formulation, it can be argued that any erroneous “but for” assumption of a contracting party provides basis for rescission if the other party to the transaction knew or should have known of the assumption and its significance. Judicial decisions rendered both before and after the revision, as well as revision comments, however, reveal that a party may bear the risk of the inaccuracy of an assumption despite the other party’s awareness of the assumption’s existence. For instance, in Boteler v. Taquino, a Louisiana court of appeal refused to rescind the sale of a used car on the basis of its involvement in two pre-sale accidents even though the buyer had sought the seller’s assurance that the vehicle never had been wrecked. The buyer had asked the seller expressly whether the automobile ever had been involved in an accident, and the seller had responded truthfully that he had no knowledge of any such event. The court refused to equate the seller’s representation with a positive assertion that a collision had not happened and ruled that the error as to the occurrence of the accidents provided no basis for relief.

The court’s decision also can be justified under the Restatement. Section 152 identifies several bases for denying rescission. First, it could be concluded that the erroneous assumption was not basic. Because the buyer offered no evidence to prove the extent of the damage to the vehicle or the alleged shortcomings of the repairs, he could contend only that he and the seller had shared the assumption that the five year old automobile had not been involved in any accident whatsoever. Even if a court believed this characterization to be accurate, it nonetheless might conclude that the assumption was not basic because some accidents result in only very minor damage and even extensive damage many times can be repaired satisfactorily. Additionally, a court following the Restatement could base a denial of relief upon the buyer’s

377. See supra notes 182-183 and accompanying text.
378. Cochran Ford, 499 So. 2d. at 512.
379. See Bilbe, supra note 6, at 900-02, 909-13 and supra text accompanying notes 7-9.
380. 517 So. 2d 377 (La. App. 5th Cir. 1987) (discussed supra in text accompanying notes 174-181).
381. Id.
382. Id. at 379-80.
383. See supra text following note 54.
failure to prove that the mistaken assumption materially affected the terms of the exchange. In the absence of any evidence indicating a difference between the vehicle’s market value and its contract price, no basis for rescission exists under Section 152. Moreover, that section identifies another possible basis for rejecting the buyer’s demand. Even in situations where avoidance otherwise is appropriate, the section asserts that relief should be denied when additional factors justify an allocation of the risk of the mistake to the complaining party. Section 154 further addresses such circumstances and indicates that rescission may be inappropriate where a party should have realized that certainty did not exist. Because the seller was himself a recent purchaser of the vehicle and represented only that he had no knowledge of any accident, a court could conclude that the buyer should have recognized that he had only limited information concerning the automobile’s history. Such a conclusion would supply yet another reason for rejecting the buyer’s claim.

Some Louisiana decisions have regarded one party’s awareness of the other’s assumption as basis for rescission in circumstances where relief need not have been granted. For example, in the pre-revision decision in Carpenter v. Williams, a court of appeal affirmed the rescission of an agreement to purchase residential property on the basis of a change in circumstances occurring after the contract was signed. The purchaser, who very reluctantly was preparing to move to a new community to comply with a condition of his employment, lamented his situation to the seller before the parties contracted to transfer the property. After the agreement was made, the employer abandoned the policy that had required the purchaser to relocate his residence. The purchaser then refused to go forward with the transaction, and the seller sued for specific performance. The purchaser contended that he, to the seller’s knowledge, was purchasing only to comply with his employer’s directive and that the elimination of this requirement resulted in a failure of cause relieving him of his obligation to purchase. Surprisingly, the court rescinded the agreement. The purchaser labored under no error at the time the contract was made, and Louisiana’s concept of failure of cause did not require a decision conditioning the enforceability of the agreement upon the continuation of his need for the property. The court certainly would not have rescinded the transaction if a formal act of sale had been executed prior to the employer’s change in its residency requirement. Similarly, there would have been no need to regard the purchaser’s assumption concerning his employer’s policy as a ground for rescission if the employer, unbeknownst to the parties, had terminated the residency requirement before the purchase agreement was made. To the contrary, such an assumption readily could be classified as an error concerning the purchaser’s “motive” which

384. See supra text following note 100.
385. 428 So. 2d 1314 (La. App. 3d Cir. 1983).
386. Id. at 1316.
supplies no justification for rescinding the purchase of an object having all attributes it was believed to have. Despite the sympathies the purchaser's situation might evoke, the agreement was not expressly conditioned upon the continuation of the employer's policy, and the commitment to purchase very reasonably could have been enforced according to its terms.

Relief under the Restatement provisions on mistake is limited to error concerning circumstances existing when the contract was made. According-ly, the buyer's complaint in Carpenter v. Williams could not constitute a ground for avoidance under Section 152. Any relief under the Restatement would have to be based upon a claim of frustration of purpose. However, if it is assumed again hypothetically that the employer terminated its residency requirement prior to the time that the agreement was made, Section 152 would have application. According to its provision, a shared assumption may be rejected as a ground for rescission on any of three bases. It can be found that the assumption was not "basic" and thus that rescission is unavailable. Further, even if it is determined that the assumption was basic, avoidance can be denied either because the assumption did not have a material effect upon the agreed exchange or because additional factors justify the allocation of the risk of the mistake to the complaining party.

Because assumptions are regarded as basic only when they clearly affect the terms of an exchange, a court readily could conclude that the purpose underlying the buyer's decision to acquire the house did not involve a basic assumption. Further, even if the erroneous assumption were so classified, rescission nonetheless would require a material variance between the home's contract price and its market value. Thus, rescission would be unavailable under the Restatement's mistake provisions if the employer's residency requirement had been terminated prior to the date of the parties' agreement.

2. Article 1952 and Section 153

Article 1952 possibly will be construed to afford relief in some situations where the party resisting rescission will have had little basis for detecting the assumption at issue. Article 1952's first paragraph provides that "[a] party who obtains rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error." Earlier discussion has addressed the uncertainty as to the availability of relief grounded upon a party's "own error" in light of Article 1949's requirement that legally significant assumptions be known or knowable by the

387. Restatement (Second) of Contracts §§ 152-53 (1981) (quoted respectively supra in text following notes 54 and 79).

388. Impracticability of performance and frustration of purpose are addressed in Sections 261-72. Section 266 concerns frustration of purpose resulting from circumstances existing at the time the contract was made.

party resisting rescission. Nonetheless, a comment to Article 1952 strongly implies that relief in some cases should be available to a party who has agreed to perform work for less than the cost of performance.

It is possible, of course, to contend that the party resisting rescission should have known that the other party believed his bid to exceed his cost of performance. If this contention were accepted, rescission could be recognized through Article 1949, and the erroneous assumption could be identified as the contractor’s “own error” under Article 1952. Accordingly, the party who unsuccessfully resists rescission would be entitled to reliance damages. Prior to the revision, however, the Louisiana appellate courts refused rescission in all instances where the party seeking judicial enforcement lacked basis for recognizing the occurrence of a mistake in price determination. Further, research has identified no case identifying Article 1952 as authority for rescinding an agreement that would not have been subject to rescission under the prior legislation. Nonetheless, the courts may recognize the possibility of rescission under Article 1952 on the basis of disparities between contract prices and performance costs. If that step were taken, it would be necessary to develop guidelines for identifying the situations that justify relief.

The Restatement identifies criteria for such determinations in Section 153. Under that provision, a contracting party’s error in formulating the price for services or construction is classified as the mistake of “one party.” Such an error provides basis for relief only when the “enforcement of the contract would be unconscionable” or “the other party had reason to know of the mistake or his fault caused the mistake.”

The Restatement provides only minimal guidance concerning the identification of agreements involving unconscionability. Neither Section 153 nor Section 208, the Restatement’s principal unconscionability provision, defines unconscionability. However, Section 153’s comment asserts that some of the factors considered in Section 208 determinations are relevant in identifying unconscionability under Section 153. The comment to Section 208 relates that “gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable.” The illustrations to Section 153 further indicate that the severity of the loss that would result from contract enforcement can constitute unconscionability.

One of the illustrations describes circumstances where a contractor who has agreed to undertake construction for $150,000 would experience a $20,000 loss if the contract were performed by both parties. No information is given

390. See supra text accompanying notes 38-47.
392. See supra cases cited in note 204 and supra text accompanying notes 44-47.
393. See supra text following note 79.
395. Id. § 208 cmt. c.
396. Id. § 153 illus. 1.
concerning the size of the contract as a proportion of the contractor’s business, and the market value of the promised construction is not provided. The illustration relates that the complaining party would have made a profit of $30,000 if the contract price had been $200,000, the sum that would have been bid but for the arithmetical error in computing the cost of performance. Thus, where a contractor is destined to lose approximately 12% of his outlay, and the contract that would have been proposed in the absence of error would have resulted in a net return of approximately 18%, the Restatement asserts that unconscionability can be found to exist. The Restatement’s next illustration also involves a situation where a contractor’s mistake in addition results in an agreement to perform work for less than its cost. In this case the loss that would occur as a consequence of performance would constitute approximately 3% of the contractor’s costs. Performance for the sum that the contractor would have bid in the absence of error would produce a net return of approximately 19%. The illustration concludes that the “court may reach a result contrary to that in [the preceding illustration] on the ground that enforcement of the contract would not be unconscionable, and hold that it is not voidable.”

The Restatement also considers the significance of reliance in unconscionability determinations. The comment to Section 153 relates that reliance by the party resisting rescission can justify enforcement of an agreement even though “enforcement would otherwise be unconscionable.” Even in situations involving significant reliance, however, the comment asserts that avoidance should be available if a monetary award adequately would protect the reliance interest of the party resisting rescission.

Article 1952 provides no criteria for identifying situations where rescission can be awarded on the basis of a party’s “own error.” However, a notion of unconscionability, despite its subjectivity, is probably the only workable basis for restricting Article 1952’s application insofar as it might afford relief in situations where rescission would be unavailable under Article 1949. Thus, Article 1952 could be construed to permit rescission of an agreement that would not be rescinded under Article 1949 only when an unconscionable disparity exists in the values of the respective performances. Further, if an award of damages pursuant to Article 1952 would not afford adequate protection for the reliance interest of the party resisting rescission, the Louisiana courts reasonably might follow the Restatement approach and enforce the agreement.

397. Id. illus. 2.
398. Id. cmt. d.
399. Id.
400. See supra text following note 4.
B. Misunderstandings

1. Articles 1949 and 1950

Article 1950 enumerates instances where "[e]rror may concern a cause." All of its categories of error were recognized also in the Louisiana Civil Code of 1870. Because the comments to Articles 1949 and 1950 assert that these provisions do not change the law, an earlier segment of this article examined the pre-revision legislation and jurisprudence concerning the significance of misunderstandings in contract formation. That discussion identified several appellate opinions asserting that certain misunderstandings, apart from the reasonableness of the parties' respective perceptions, preclude the recognition of contractual commitment. In the case of error as to the nature of the contract, error as to the contractual object, and certain instances of error as to the person, it appears that pre-revision law did not permit the recognition of contractual relationships defined in accordance with the understanding of the party having the more reasonable perceptions. In the case of less radical misunderstandings, including matters that can be characterized as issues of ambiguity and interpretation, the Civil Code of 1870, like the present Civil Code, recognized contractual commitments defined in accordance with the perceptions of one of the parties.

The Louisiana courts have not had occasion to determine whether the categories of error as to the nature of the contract, error as to the contractual object, and error as to the person have the significance that they had in pre-revision law. In addition to the comments accompanying Articles 1949 and 1950, however, there is reason to believe that the former approach will be continued. In the case of error as to the nature of the contract, the fact that one party's perceptions are more reasonable than the other's does not alter the fact that the parties do not intend to enter the same generic transaction. To hold a party to a contract in these circumstances would eliminate consent almost completely as a requisite for contractual responsibility.

The category of error as to the contractual object concerns a situation analogous to the case of error as to the nature of the contract. Error as to the object exists when each party thinks that a different item is involved in the
transaction. For example, one party believes he is selling a particular tract of land, and the other intends to purchase a different parcel. Here, as in the case of error as to the nature of the contract, the recognition of a contractual relationship defined in accordance with the perceptions of one party would result in legal consequences radically different from those intended by the other.

Error as to the person similarly may involve circumstances where the recognition of contractual responsibility would result in legal consequences markedly different from those contemplated by one of the parties. In this case, one contracting party is mistaken as to the other's identity. Insofar as the dichotomy between mistaken assumptions and misunderstandings, error as to the person involves circumstances arguably fitting both categories. Because the complaining party agreed to receive a performance from the party with whom he dealt, his complaint can be expressed in terms of a mistaken assumption as to the other party's identity. However, the situation also can be characterized as a misunderstanding as to the performance sought by the complaining party. In any event, in pre-revision law, such error provided basis for rescission of certain categories of contract despite the absence of any basis whereby the party resisting rescission might have recognized that his services truly were not sought. Further, error as to the person, like error as to the nature of the contract and error as to the contractual object, may involve circumstances where the performance one party intends to render is radically different from the performance the other intends to receive.

The availability of rescission in all three of these categories is further justified by Article 1952. Once more, that provision requires a party obtaining rescission on the basis of his "own error" to compensate the other party for the adverse consequences of his reliance. Accordingly, in situations where a misunderstanding can be attributed to one of the parties as his "own error," the other party's reliance interest is afforded protection. Additionally, where one party can be found to have been negligent in causing the other to conclude that a contract has been entered, a responsibility for reliance damages can be recognized under the Civil Code articles on detrimental reliance and delict. In all cases where such compensation can be awarded to the party

413. See supra text accompanying notes 1-4.
414. See supra text accompanying notes 22-36.
415. See supra text following note 4 and supra text accompanying notes 38-49.
416. La. Civ. Code art. 1952:
   Cause is the reason why a party obligates himself.
   A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.
who relied on the ostensible agreement, a decree of rescission deprives him only
of his expectation interest. Further, this remedy relieves the other party of a
commitment he did not intend to incur.

2. Sections 20 and 153

Under the Restatement, a manifestation of mutual assent is a requirement for
contractual commitment.\textsuperscript{418} Section 20 identifies situations where misunder-
standings do and do not preclude the requisite expression. Pursuant to that
provision, a contract can be recognized in accordance with the “meaning
attached” by one of the parties if that party did not know of any different
understanding of the other party and the latter knew of the meaning attached by
the first party. Similarly, contractual commitment can be defined in accordance
with “the meaning attached . . . by one of the parties if . . . that party has no
reason to know of any different meaning attached by the other, and the other has
reason to know the meaning attached by the first party.”\textsuperscript{419} The illustrations
accompanying the section involve variations on the controversy in \textit{Raffles v. Wichelhaus},\textsuperscript{420} a case involving two ships named “Peerless” with significantly
different sailing dates. In each illustration, the parties, like the litigants in the
actual suit, express agreement for the sale of goods to be shipped ex steamer
“Peerless.” According to the Restatement: where both parties intend the same
ship, there is a contract; where they intend different ships, and neither knows nor
has reason to know that they mean different ships or they both know or have
reason to know of their misunderstanding, there is no contract; on the other hand,
where one party knows the ship intended by the other and the latter party does
not know of the second ship’s existence, there is a contract defined in accordance
with the latter party’s perceptions; similarly, where neither party knows there are
two ships, but the first party has reason to know that the second party means one
ship, and the second party has no reason to know that the first party means

\begin{itemize}
\item [\textsuperscript{418}] Restatement (Second) of Contracts § 17 (1981).
\item [\textsuperscript{419}] Id. § 20.
\item Effect of Misunderstanding
\item (1) There is no manifestation of mutual assent to an exchange if the parties attach
materially different meanings to their manifestations and
\item (a) neither party knows or has reason to know the meaning attached by the other;
or
\item (b) each party knows or each party has reason to know the meaning attached by
the other.
\item (2) The manifestations of the parties are operative in accordance with the meaning
attached to them by one of the parties if
\item (a) that party does not know of any different meaning attached by the other, and
the other knows the meaning attached by the first party; or
\item (b) that party has no reason to know of any different meaning attached by the
other, and the other has reason to know the meaning attached by the first party.
\item [\textsuperscript{420}] 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).
\end{itemize}
another vessel, there is a contract defined in accordance with the second party’s perceptions.\textsuperscript{421}

Although a misunderstanding does not necessarily preclude contract formation under Section 20, an agreement recognized under its provision is subject to avoidance under Section 153 if enforcement would produce unconscionable results.\textsuperscript{422} Thus, an illustration accompanying the latter section describes a \textit{Raffles v. Wichelhaus} variation in which a contract can be recognized despite the parties’ misunderstanding and asserts that the agreement can be rescinded if unconscionability exists.\textsuperscript{423} Another illustration\textsuperscript{424} proposes an analogous solution where a buyer agrees to pay $100,000 for property identified by a street address under a belief that “this description includes an additional tract of land worth $30,000.”\textsuperscript{425} The seller owns property designated by the street address but does not own the additional property sought by the purchaser. The illustration recognizes the existence of a contract but directs that the agreement be examined concerning its possible unconscionability. Additionally, the section includes illustrations identifying unconscionability as a basis for rescinding contracts recognized despite one party’s mistake as to the identity of the other.\textsuperscript{426}

\textbf{C. Fault and the Availability of Rescission and Reliance Damages}

\textit{1. Article 1952}

The Civil Code articles concerning error do not contain any provision expressly addressing fault either as a factor affecting the availability of rescission or as a basis for reliance damages in situations where rescission is decreed. \textit{Article 1952}, however, implies that fault is relevant in determining whether a party obtaining rescission will be required to compensate the other party for his detrimental reliance upon the agreement. That article imposes such a responsibility upon the “party who obtains rescission on grounds of his own error” unless the other party “knew or should have known of the error.” Because responsibility for another’s loss is recognized only when the error can be attributed to the party obtaining rescission, the provision implicitly affirms that reliance damages normally must be borne by the party or parties suffering them. Similarly, the article suggests that its imposition of responsibility presupposes the fault of the party obtaining rescission.\textsuperscript{427}

\textsuperscript{421} Restatement (Second) of Contracts § 20 illus. 1-4 (1981).
\textsuperscript{422} See supra text accompanying notes 84-100.
\textsuperscript{423} Restatement (Second) of Contracts § 153 illus. 6 (1981).
\textsuperscript{424} Id. illus. 5.
\textsuperscript{425} Id.
\textsuperscript{426} Id. illus. 11-13.
\textsuperscript{427} The role of fault in determining responsibility for a party’s “own error” under Article 1952 is discussed supra in the text accompanying notes 38-44, 47-48.
In some instances, a misunderstanding technically may preclude the recognition of any agreement and thus the existence of a contract subject to rescission under Article 1952. For example, error as to the nature of the contract and error as to the contractual object could be found to have this effect. Even if these misunderstandings prevent direct application of Article 1952, the provision very reasonably can be applied by analogy to protect a party’s reliance interest when a misunderstanding can be attributed to the other party. Additionally, the articles on detrimental reliance and delict can justify awards of reliance damages where one party’s fault justifies the other’s belief in the existence of an agreement.

2. Inexcusable Error and Section 157

In the 1987 supreme court decision in Scott v. Bank of Coushatta, the majority identifies “inexcusable neglect” as basis for denying a claim to rescission grounded upon “unilateral error.” In another passage, this opinion similarly asserts that “error on the part of one party may not invalidate the agreement if the cause of the error was the complaining party’s inexcusable neglect in discovering the error.” Because the transaction at issue occurred before the revision’s January 1, 1985, effective date, the Civil Code of 1870 applied to the controversy. However, the majority’s conclusions concerning a concept of inexcusable error are based primarily upon pre-revision appellate decisions, and the opinion in no way suggests that its analysis is limited to pre-revision controversies. Also, while the majority opinion contains no express reference to the revision comment to Article 1952, one of the dissenting justices refers to that provision in affirming the existence of a concept of inexcusable error under the revised legislation. Furthermore, court of appeal decisions involving post-revision controversies have cited the majority opinion in asserting that inexcusable error bars rescission.

The majority opinion in Scott provides only limited guidance concerning the identification of situations where inexcusable conduct precludes relief. However, the opinion refers only to “unilateral error” and “error . . . of one party” in describing circumstances where error may be found to be inexcusable.

428. See supra text accompanying notes 12-17, 42-44. Although some instances of error as to person can be regarded as misunderstandings that vitiate consent and provide basis for rescission, these situations would not constitute obstacles to contract formation.
429. See supra notes 42-44, 48, 416-417 and accompanying text.
431. Id. at 361.
432. See supra text accompanying notes 296-308.
433. Scott, 512 So. 2d at 365 (Dennis, J., dissenting) (discussed supra in text accompanying notes 315-318).
434. See supra text accompanying notes 318-371.
435. Scott, 512 So. 2d at 362, 363.
436. Id. at 361.
Additionally, the opinion asserts that error is apt to be found inexcusable if it is "easily detectable, and could have been rectified by a minimum amount of care." 437

Subsequent court of appeal decisions have not contributed significantly to the development of the inexcusable error concept. Despite the identification of inexcusable error in at least three of these cases, the opinions provide little basis for generalizations concerning factors that might bar rescission. Further, in two of these decisions, the absence of the Civil Code requirements for rescission itself justified the enforcement of the agreements. 438

Under Restatement section 157, "[a] mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation . . . unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." 439 The comment to the section affirms that relief should not be denied simply because a mistake resulted from failure to exercise reasonable care. 440 The provision further relates that "gross negligence" was rejected as a description of the degree of fault precluding avoidance. 441

The restrictions on the availability of rescission under both Louisiana law and the Restatement significantly reduce any need to utilize fault as a basis for limiting relief. Under Article 1949, a mistaken assumption constitutes a ground for rescission only if the party seeking enforcement of the agreement knew or should have known of the assumption's existence. Further, relief under that article usually will not be available unless the assumption has had a significant impact upon the terms of the agreement. When such circumstances are present, the fact that an erroneous assumption can be attributed to the fault of one of the parties need not be regarded as a reason for denying rescission.

In comparison to Louisiana law, there is even less need under the Restatement to utilize fault as a basis for denying relief. Pursuant to Section 152, avoidance is available only if a "basic assumption" shared by both parties had a "material effect" on the agreed exchange of performances. In the case of an assumption made by only one of the parties in circumstances where the other party neither had reason to know of the assumption nor was responsible for its existence, Section 153 permits avoidance only if enforcement of the agreement would be unconscionable. In light of these restrictions, the Restatement very

437. Id. at 362. The majority also states that "Louisiana courts appear reluctant to vitiate agreements when the complaining party is, either through education or experience, in a position which renders his claim of error particularly difficult to rationalize, accept, or condone." Id. See supra text accompanying note 308.

438. See Woods v. Morgan City Lions Club, 588 So. 2d 1196 (La. App. 1st Cir. 1991) (discussed supra in text accompanying notes 335-346); Smith v. Remodeling Serv., Inc., 648 So. 2d 995 (La. App. 5th Cir. 1994) (discussed supra in text accompanying notes 348-351).

439. See supra text following note 126.


441. Id.
reasonably limits its fault-based preclusion to failure to act in good faith and in accordance with reasonable standards of fair dealing.

VIII. CONCLUSION

Despite the differences between the Louisiana and the Restatement provisions concerning mistaken assumptions, the availability of rescission in a given situation usually will be the same under either formulation. Most assumptions that have been recognized as grounds for rescission in the Louisiana jurisprudence significantly affected the terms of an agreed exchange. However, such an impact is not a requirement for rescission under the Louisiana legislation, and the appellate cases include at least one decision granting rescission as a consequence of an error having no impact upon the terms of the agreement. In contrast, relief under the Restatement is available only if a material disparity exists between the value exchange that would result from contract enforcement and the value exchange that would have occurred if the erroneous assumption had been accurate. Significantly, however, the Restatement holds open the possibility of rescinding agreements that do not involve economic disparities through the application of its concept of frustration of purpose. In light of this possibility, the similarities of Louisiana's law of error and the Restatement's avoidance provisions are greater than the latter's mistake formulations suggest.

As previously noted, the Civil Code includes an article providing that "[a] party who obtains rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error." The availability of relief grounded upon a claimant's "own error" is uncertain in light of the Civil Code's general requirement that legally significant assumptions be known or knowable by the party resisting rescission. However, a revision comment suggests that there are circumstances where a party who has agreed to perform work for less than the cost of performance should be entitled to relief. Accordingly, the courts may conclude that some disparities between contract price and cost of performance

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442. See Bilbe, supra note 6, at 943-45 and Cochran Ford, Inc. v. Copeland, 499 So. 2d 509 (La. App. 2d Cir. 1986) (discussed supra in text accompanying notes 192-197).
443. Louisiana Civil Code article 1949 requires only that the error affect the complaining party's "cause." See supra text accompanying notes 4-10.
445. See supra text accompanying notes 74-79.
446. Restatement (Second) of Contracts § 152 illus. 9 (1981); id. § 266(2) (1981).
447. See La. Civ. Code art. 1952 (quoted supra in text following note 4) and text supra accompanying notes 38-47.
449. See La. Civ. Code art. 1952 cmt. (b) and supra text accompanying notes 44-47.
supply grounds for rescission. If this approach is taken, it will be necessary to develop standards for identifying the situations warranting relief.

The Restatement contains provisions that could be useful to the Louisiana courts in determining when rescission is available. The relevant section classifies a contracting party’s error in formulating the price for services or construction as the mistake of “one party.” Such error justifies rescission only when the “enforcement of the contract would be unconscionable” or “the other party had reason to know of the mistake or his fault caused the mistake.” For the purpose of avoidance under this provision, the magnitude of the loss that would result from contract enforcement can justify a finding of unconscionability.

The Civil Code does not establish criteria for identifying situations where rescission and reliance damages will be awarded as a consequence of a party’s “own error.” If the courts conclude that certain assumptions provide grounds for rescission even though they were not known or knowable by the party seeking to enforce the agreement, difficult questions will be presented concerning the requisites for relief. A concept of unconscionability, however, could provide a feasible basis for restricting the “own error” provision insofar as it affords relief where rescission would be unavailable under the Civil Code’s other articles on error. Thus, an agreement not otherwise subject to rescission would be set aside only when an unconscionable disparity exists in the values of the respective performances.

In the case of misunderstandings, the differences between the Louisiana and the Restatement provisions are more pronounced. The Civil Code identifies categories of error that can affect “cause” including three misunderstandings: error as to the nature of the contract, error as to the contractual object, and error as to the person. Although the matter has not received the attention of the appellate courts since the Civil Code’s 1984 revision, it appears that error as to the nature of the contract, error as to the contractual object, and certain instances of error as to the person preclude the recognition of a contractual relationship defined in accordance with the perceptions of one of the contracting parties. The inability to recognize contractual commitment, however, does not foreclose claims for detrimental reliance. Such demands can be recognized on several bases. First, the Civil Code article permitting rescission grounded upon a party’s “own error” imposes a responsibility for reliance damages upon the party who obtains rescission. If any of these three categories of misunder-

451. Id.
452. See supra text accompanying notes 84-100.
454. La. Civ. Code art. 1950 (quoted supra in text following note 4). Error as to the person can be classified both as the consequence of a mistaken assumption and as an instance of misunderstanding. See supra text accompanying note 413.
455. See supra text accompanying notes 9-38.
standing technically precludes contract formation, the article nonetheless can be construed to encompass the situation when responsibility for the misunderstanding can be assigned to one of the parties. Additionally, the Civil Code articles on detrimental reliance and delict can supply bases for responsibility where the fault of one party results in the other’s reasonable conclusion that contractual commitment has been expressed.

Under the Restatement, it is possible to recognize a contract in cases of radical misunderstandings including error as to the nature of the contract, error as to the contractual object, and error as to the person in Louisiana’s scheme of classification. A contract can be defined in accordance with the “meaning attached” by one of the parties if circumstances justify the selection of his perceptions over those of the other. However, a contract recognized despite a misunderstanding is subject to avoidance if its enforcement would produce unconscionable results.

In the case of less drastic misunderstandings that can be classified as issues of contract ambiguity and interpretation, Louisiana law, like the Restatement, permits the resolution of controversies by the recognition of contractual commitment defined in accordance with the perceptions of one the parties. In light of this similarity and of the Restatement provision permitting the avoidance of contracts recognized despite misunderstandings, the differences between the Louisiana and the Restatement approaches are less significant than they initially appear.

The Civil Code articles concerning error do not contain any provision expressly addressing fault as a factor affecting the availability of rescission. However, a revision comment asserts that a court may consider whether error is “excusable or inexcusable” in determining “whether to grant rescission or, when rescission is granted, whether to allow any recovery to the party not in error.” In decisions rendered both before and after the revision, Louisiana appellate courts have identified the fault of a complaining party as a justification for denying rescission. Further, in 1987, the Louisiana supreme court identified “inexcusable neglect” as basis for denying a claim for rescission grounded upon a party’s “unilateral error.”

The substantial requirements for rescission existing under both Louisiana law and the Restatement significantly reduce any need to utilize fault in limiting

457. See supra text accompanying notes 12-17, 42-48, 427-429 and note 43.
460. See supra text accompanying notes 84-100.
462. See supra text accompanying notes 84-100.
instances of relief. In light of its restrictions on the availability of rescission, the Restatement rationally limits its fault-based preclusion to failure to act in good faith and in accordance with reasonable standards of fair dealing. The comparable restrictions in Louisiana’s law of rescission similarly reduce any need for a concept of “inexcusable error.” As a general proposition, judicial inquiry should begin with an examination of all factors relevant to the possibility of rescission under the applicable legislation. In that consideration, particular attention should be given to the impact of the error upon the value exchange agreed to by the parties. If such analysis indicates both that consent was vitiated and that protection should be afforded to the party resisting relief, the legislation very probably permits both rescission and an award of reliance damages. It seldom should be necessary to recognize fault as a barrier to otherwise available relief.

When the Louisiana law of error and the Restatement provisions on mistake are considered in their entirety, the similarities outnumber the differences. These common denominators are not surprising. At least for the purposes of contract law, the assumptions and expectations of Louisiana’s contracting parties are little different from those of their counterparts in the rest of the United States. Similarly, whether addressed in terms of error or mistake, all courts must balance the need for stability of contract with the desire to protect parties to transactions undermined by error.

Comparative examination of specific areas of law enhances understanding of the respective provisions. When the provisions are conceptually similar, the possibility of detailed comparisons presents particular opportunities. Such comparisons yield additional benefit when they identify developments that can be utilized in the compatible law of other jurisdictions. The similarities of the Louisiana law of error and the Restatement provisions on mistake clearly illustrate the existence of situations where Louisiana courts productively can consider Restatement approaches as well as developments in individual states. Similar opportunities exist for courts of other states to benefit from examination of the Louisiana legislation and jurisprudence.