Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita

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I. INTRODUCTION

Panic struck South Louisiana like it never had before. Officials scrambled to secure the state and prepare it for the inevitable problems that would follow from the looming danger in the Gulf of Mexico. Lookouts spotted the threat sailing across the water into Louisiana—there were British troops sailing through Lake Borgne on their way to New Orleans.1 Even before the troops set foot on the Louisiana mainland,2 the state legislature had already suspended prescription for 120 days.3 Without the burden of prescription, citizens could focus on what would become the Battle of New Orleans.4

The situation was somewhat familiar almost two hundred years later with another danger looming in the Gulf of Mexico. Louisianans once again braced themselves for the worst, and while they did not know exactly what to expect from Hurricane Katrina,5 they knew that it would wreak havoc on the state. At first, it looked like the city of New Orleans had “dodged a bullet.” Expected hurricane destruction would have been a relief considering what actually occurred. What was feared unfortunately came to fruition in a day’s time when levee breaches brought the city’s problems to a whole new level. An estimated eighty percent of the city’s evacuated residents watched as the storm submerged eighty percent

1. ROBERT V. REMINI, THE BATTLE OF NEW ORLEANS xiv (1999). Americans first spotted the British off Lake Borgne on December 12, 1814. Id. After defeating American gunboats on December 14th, the British made landfall on Pea Island (in between Lake Borgne and Lake Ponchatrain) on December 16th. Id.


4. REMINI, supra note 1, at xiv.

5. Hurricane Katrina struck the Southeast Louisiana coastline near Buras as a strong Category 3 hurricane on August 29, 2005. It was one of the most devastating natural disasters in U.S. history. RICHARD D. KNABB, JAMIE R. RHOME & DANIEL P. BROWN, NAT’L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 1, 3 (2005), http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.
of New Orleans. Amidst the chaos, it was impossible for many people to meet their prescriptive deadlines.

One week later, Governor Kathleen Blanco responded by issuing an executive order for the retroactive suspension of all prescriptive and peremptive periods beginning on the date the hurricane struck and lasting through at least September 25th. The Governor followed this executive order with two subsequent orders further extending the prescriptive and peremptive periods. On September 24th, Hurricane Rita struck Southwest Louisiana and further strained the state's resources.

Amidst concern that the Governor's executive orders were illegal for want of authority to modify prescriptive periods, the legislature (which has exclusive authority to modify prescription) ratified and modified her orders. To further complicate matters, there is concern that this legislative action was unconstitutional because it deprived defendants of their vested rights by retroactively modifying prescriptive and peremptive periods.

While it was ostensibly both rational and practical to suspend prescriptive and peremptive periods for all legal proceedings throughout the state in the wake of Hurricanes Katrina and Rita, this approach was problematic for two reasons: (1) there was a narrow window (a day) within which the legislature had to act before the suspension of prescription was either impermissibly retroactive or neglected claims that prescribed during or after the hurricanes; and (2) the hurricanes invariably affected litigants in different ways.

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9. Hurricane Rita struck Southwest Louisiana near the Texas border as a Category 3 hurricane on September 23, 2005. KNABB ET AL., supra note 5, at 3.
10. LA. CIV. CODE ANN. art. 3457 (2007) ("There is no prescription other than that established by legislation.").
A better response would have been to resort to a doctrine that Louisiana and other civil law jurisdictions have recognized for hundreds of years for the suspension of prescription: *contra non valentem*. Part II of this Comment traces the evolution of *contra non valentem* from its roots in Roman law to Louisiana’s treatment of the doctrine and analyzes its application in situations where a factual impediment prevents attorneys from complying with applicable prescriptive or peremptive periods. Part III of this Comment explores how other civil law jurisdictions have treated the doctrine of *contra non valentem* in similar situations and also evaluates how common law jurisdictions handle similar matters without the doctrine. Part IV of this Comment evaluates the post-hurricane legislation that retroactively revived prescribed claims in terms of overbreadth and impermissible retroactivity. Finally, in light of the challenges presented by Hurricanes Katrina and Rita, Part V of this Comment recommends the use of *contra non valentem* in future situations where a factual impediment prevents attorneys from complying with prescriptive and peremptive periods.

II. BACKGROUND

A. Louisiana’s Treatment of Contra Non Valentem

1. The Inception of Contra Non Valentem in Louisiana

In Louisiana, “[a] person may lose his right to assert a cause of action because of passage of time by either peremption or prescription.”13 Prescription is a “limitation of time fixed by law for the exercise of a right, and the effect of prescription when pleaded by the obligor is that the obligee’s untimely action is barred.”14 Prescription is subject to suspension, interruption, or the “doctrine of *contra non valentem agere nulla currit praescriptio*.”15 Peremption, however, is “a period of time fixed by law for the existence of a

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14. Id. Although much of the comparative analysis in this Comment does not discuss peremption, it is addressed in the recommendations section.
15. Id.
right” that "may not be renounced, interrupted, or suspended." Contra non valentem may not suspend peremption.

The first reported decision to apply contra non valentem in Louisiana was Quierry's Ex'r v. Faussier's Ex'rs, where the Louisiana Supreme Court recognized the validity of the state legislature's prospective suspension of certain legal actions for 120 days in response to the Battle of New Orleans. After years of judicial experimentation, Louisiana courts recognized contra non valentem in three general instances:

1st. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; a class of cases recognized by the Roman law as proper for the allowance of the utile tempus. 2d. The second class of cases are those where there was some condition or matter coupled with the contract or connected with the proceeding which prevented the creditor from suing or acting. 3d. The third class of cases is where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action.

Additionally, "[m]odern jurisprudence also recognizes a fourth type of situation where contra non valentem applies so that prescription does not run: Where the cause of action is not known or

18. 4 Mart. (o.s.) 609 (La. 1817).
19. 1814 La. Acts No. 18 § 1 ("Be it enacted by the senate and house of representatives of the state of Louisiana in general assembly convened, That no protest on any note or bill of exchange, payable to order or bearer, or on any note, bill of exchange, or obligation for the payment of money, shall or can be legally made, until one hundred and twenty days after the promulgation of the present act."); Id. at § 3 ("And be it further enacted, That from and after the promulgation of this act, no civil suit or action shall be commenced or prosecuted before any court of record or other tribunal of this state, nor shall any execution issue or [sic] be proceeded upon; and all proceedings in civil suits or actions, now pending before any such court or tribunal, shall henceforth cease and be suspended during the time this act shall remain in force."). This Act was effective in Orleans Parish on December 18, 1814, and in the other Louisiana parishes upon its promulgation. Id. at § 6.
20. REMINI, supra note 1, at xiv.
reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant."

The instance with which we are concerned is the first: where some condition prevented the courts from "acting or taking cognizance" of the plaintiff’s action. Modern recapitulations of the four categories of contra non valentem have inaccurately termed this first category as one "where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff’s action," even though the jurisprudence clearly treats this category as one that embodies both factual and legal barriers. This bifurcation is true both in Louisiana law and other civilian jurisprudence. The earliest reported decision to mistakenly use the word "legal" to describe the first category of contra non valentem cases without regard to factual impediments was Suire v. Combined Insurance Co. of America. Over a hundred reported Louisiana decisions have subsequently copied the same

25. See, e.g., Quierry’s Ex’r v. Faussier’s Ex’rs, 4 Mart. (o.s.) 609 (La. 1817) (where British hostilities in Louisiana prevented the running of prescription during the War of 1812). See also Smith v. Taylor, 10 Rob. 133, 135 (La. 1845) (where the plaintiff was prevented from filing suit because of the absence of the court clerk and his deputy); FRANK L. MARAIST & THOMAS C. GALLIGAN, LOUISIANA TORT LAW 222 (1996) (citing "war or some natural disaster, such as a hurricane" as examples of events in the "legal cause" category).
26. See, e.g., Ayraud v. Babin’s Heirs, 7 Mart. (n.s.) 471 (La. 1829) (where the appellant was prevented from applying for an order of seizure because he was the judge of the district and there were no provisions in law available for another judge to grant such orders until after the cause of action prescribed).
27. 9 P.-B. MIGNAULT, LE DROIT CIVIL CANADIEN 452–53 (1916); J. CARBONNIER, La Règle Contra Non Valentem Agere Non Currit Praescriptio, in 77 REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE 155, 164, 169 (1937).
language, including the seminal case of Corsey v. State Department of Corrections. This Comment is only concerned with those situations where there is a factual impediment to meeting a prescriptive period.

Despite its deep roots in Louisiana jurisprudence, Louisiana courts routinely but inconsistently rejected contra non valentem in post-Civil War cases in a way that only political strife can explain. In Smith v. Stewart, the Louisiana Supreme Court declared the doctrine to be against Civil Code provisions. This decision effectively overruled previous jurisprudence on the matter; however, the United States Supreme Court interpreted contra non valentem to be the law in Louisiana in Levy v. Stewart, thereby effectively overruling cases like Smith v. Stewart. Just days after the Levy decision, the U.S. Supreme Court ruled in Stewart v. Kahn that a congressional act issued in 1864 suspending prescription (or its common law equivalent) throughout the country was constitutional. The Court conceded that a "severe and literal construction of the language [might mean that] . . . [the] clause was intended to be made wholly prospective" but chose instead to give it retroactive effect according to what it believed was the intention of

29. Search conducted by the author on Westlaw.
30. 375 So. 2d 1319 (La. 1979).
33. 78 U.S. 244 (1871).
34. Favrot, supra note 32, at 250 (citing Smith, 21 La. Ann. 67 (La. 1869)).
35. 1 Stat. 118 (1864) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or the arrest of such person, or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action.").
36. 78 U.S. 493, 504 (1871).
the statute. The Louisiana Supreme Court blatantly ignored Kahn in deciding the case of Harrison v. Succession of Adger by interpreting Congress’ act of 1864 as strictly prospective in effect. The Harrison court balked at the Kahn opinion as “simply the recognition of the maxim, contra non valentem,” which the Louisiana Supreme Court previously held as having no place in Louisiana law. Despite their continued resentment of contra non valentem, the same five justices in Tutorship of Hewitt recognized the doctrine in principle but without name two years after they expressly overruled it in Smith v. Stewart and one year before they again refused to recognize it in Harrison. In due time, the Louisiana Supreme Court reinstated contra non valentem by name in Louisiana in 1880 with Succession of Farmer and formally recognized it as law again in McKnight v. Calhoun.

One commentator has posited an explanation for these inconsistent applications of contra non valentem, explaining that refusing to apply the doctrine “spared the Court from deciding a great political question arising out of the Civil War” such as whether actions by agents of a rebellious government were lawful. This idea holds force in light of the fact that the principle of contra non valentem was recognized during the Civil War in matters of tutorship but not when members of the Pointe Coupee Parish militia burned two hundred seventy-five bales of cotton.

37. Id.
39. Id.
40. 23 La. Ann. 682, 682 (La. 1871) (“Prescription does not run against the tutor on a claim which he has against his ward for board and lodging during the tutorship, nor are such items prescribed until the lapse of four years after the tutorship has terminated, that being the period of time allowed by law to the minor after emancipation within which the tutor may be called upon for an account.”).
41. 21 La. Ann. 67 (La. 1869).
42. 24 La. Ann. at 565.
43. 32 La. Ann. 1037 (La. 1880).
44. 36 La. Ann. 408 (La. 1884).
2. Modern Development of Contra Non Valentem in Louisiana

At first glance, it would appear that the 1982 revision of former Louisiana Civil Code article 3521 had the effect of eliminating contra non valentem from law in Louisiana once again.\(^{48}\) Article 3521 formerly indicated that “[p]rescription runs against all persons, unless they are included in some exception established by law.”\(^{49}\) The revision ostensibly abrogated the exceptions to prescription, stating that “[p]rescription runs against all persons unless exception is established by legislation.”\(^{50}\) It seems that the legislature intended to eliminate jurisprudential favor of contra non valentem, but a comment in the 1987 edition of the Code reveals that contra non valentem continues to be the law in Louisiana.\(^{51}\)

One commentator has criticized that the only basis for contra non valentem is a mere comment to the Civil Code, noting, “There is nothing strange if a new Code article sets forth a rule that codifies the prevailing jurisprudence, but there is something very strange if the new article has not done that and the comment alone is the basis of the codification.”\(^{52}\) Nevertheless, Louisiana Civil Code article 3467 comment (d) is still the only printed recognition of contra non valentem in the Louisiana Civil Code, as actual legislative adoption remains to be seen. The Louisiana Supreme Court continues to support the doctrine.\(^{53}\)

B. The Evolution of Contra Non Valentem: Roman Roots and French Propagation

The doctrine of contra non valentem emerged as a medieval catchphrase in the fourteenth century. Bartolus used the phrase for


\(^{52}\) Palmer, *supra* note 48, at 261.

various Roman law principles, stating "contra non valentem agere non currit praescriptio" ("prescription does not run against someone who is unable to act"). Bartolus' doctrine appears in various comments to the Digesta, the Codex Justinianus, and the code de annali exceptione. Irenius made a similar observation as early as the twelfth century, stating "praescription non currit in his qui se velint agere non possunt." ("prescription does not run in the case of those who find themselves unable to act"). Early conceptions of contra non valentem were largely relegated to legal impediments to prescription, though other commentators did not have such a narrow perception. Nevertheless, contra non valentem emerged as an equitable response to both factual and legal impediments to prescription.

The Canon law, ever hostile to the concept of prescription, was largely responsible for propagating the doctrine and broadening it to include factual obstacles. Jurisprudential support for the doctrine grew to account for impediments such as "youth, mental disease, dotal status, condition or term, the eventual nature of the right, absence, lack of knowledge, [and] irresistible force." As the maxim passed from Italy to France, French commentators bifurcated the doctrine into factual and legal "impossibility to act" and treated each category with tempered circumspection. They were particularly concerned with the plasticity with which the jurisprudence had treated prescriptive periods and sought to reaffirm its importance:

54. CARBONNIER, supra note 27, at 157 (author's translation).
56. Id.
57. Id. Clément indicated that that contra non valentem applied generally to legal obstacles while factual impediments triggered in integrum restitution. Id. Baudry-Lacantinerie and Tissier note that this opinion is not unanimously accepted. Id.
58. CARBONNIER, supra note 27, at 157.
59. BAUDRY-LACANTINERIE & TISSIER, supra note 55, NO. 367, at 192.
60. CARBONNIER, supra note 27, at 157.
[T]his new popularity of the rule Contra non valentem agere . . . must not allow us to lose sight of the gravity of the consequences. Here is an institution, prescription, which represents a social interest of prime importance. Society has an obvious prime social interest in these prescriptions being brief and certain. . . . And under the cover of the maxim, these delays will be again lengthened, a general case of suspension will be added to the list of these special cases.61

Baudry-Lacantinerie and Tissier noted, "One forgets that the main justification of prescription is a higher social interest, which operates irrespective of whether the interested party was or was not prevented from acting."62 While maintaining the social value of suspending prescription in limited situations, Carbonnier cautioned that "[i]t must be well admitted that such a limitation must remain an exceptional thing and it must be set a priori that the legal rule [of suspending prescription] is not a common practice."63

Leaving legal applications of contra non valentem aside, French commentators often couched impossibility to act "in fact" (l'impossibilité d'agir en fait) in terms of force majeure.64 While force majeure is much broader in scope than contra non valentem alone, French common law developed three general aspects that characterized situations where force majeure triggered the contra non valentem defense to prescription: "1. The major force produces

61. Id. at 161–62 (author’s translation) (“[C]ette faveur nouvelle de la règle Contra non valentem agere . . . ne saurait nous faire perdre de vue la gravité de ses conséquences. Voici une institution, la prescription, qui représente un intérêt social de première importance. La société a un évident intérêt à ce que les prescriptions soient brèves, certaines. . . . Et, sous le couvert de la maxime, ces délais vont encore être allongés, une cause générale de suspension va être ajoutée à la liste des causes spéciales.”).

62. BAUDRY-LACANTINERIE & TISSIER, supra note 55, NO. 368, at 193.

63. CARBONNIER, supra note 27, at 162 (author’s translation) (“[I]l faut bien admettre qu'une telle limitation doit rester quelque chose d'exceptionnel et l'on peut poser a priori que la règle jurisprudentielle n'est pas d'une application commune.”).

an absolute impossibility. 2. It (the force) supposes a foreign occurrence to the person who takes advantage of it. 3. It is in a certain relationship—a relationship of exclusion, ordinarily—with the idea of fault.”

The jurisprudence strictly construed impossibility in fact as “absolute” impossibility and discounted simple difficulties as insufficient. Carbonnier hypothesized some illustrative examples of force majeure, including war, civil unrest, plagues, calamities, and anything else that could impede communications and disorganize the justice system; however, he considered these hypothetical applications impractical because he was confident that the legislature would develop a collective remedy when necessary. He was indeed at least historically correct, as the French legislature suspended prescription during the Franco-German War of 1870–1871 and World War I. It would also suspend prescription during World War II. As we will explore shortly, these academic exercises proved to be much more important in light of more sudden and unforeseeable calamities such as the aftermath of Hurricanes Katrina and Rita. Moreover, the narrow window of time within which the legislature must act to avoid retroactively reviving

65. Id. at 170 (author’s translation) (“1. La force majeure produit une impossibilité absolue. 2. Elle suppose un fait étranger à la personne de celui qui s’en prévaut. 3. Elle est dans un certain rapport—rapport d’exclusion, ordinairement—avec l’idée de faute.”).

66. Id.

67. Id. at 170–71.

68. Id. at 171.


70. Id.; see also BAUDRY-LACANTINERIE & TISSIER, supra note 55, NO. 370, at 195 (citing Law of 5 August 1914, Art. 2, which was effective retroactively from its promulgation on August 10, 1914 to August 2, 1914 (“For the duration of the mobilization and until the cessation of hostilities the government is authorized to take, in general interest and through the council of ministers, all the measures necessary to facilitate the execution or suspend the effects of commercial or civil obligations, [and] to suspend all prescriptions and prescriptive procedural terms in civil, commercial and administrative matters . . . “)).

prescribed actions further illustrates the danger of relying on the legislature to suspend prescription.

Other commentators were even more critical of unwieldy applications of *contra non valentem*. Troplong, in referencing a *Cour de Cassation* opinion from 1829,\(^{72}\) noted that war does not in and of itself suspend prescription without something more onerous to the individual litigant, such as a blockade:

> If the resulting obstacles of war and of plague manifest themselves in an intermediary time not near to the deadline of prescription, it must not be taken into account, as, since the creditor is given the liberty to act, he can take the time necessary for forcing his debtor into payment . . . .\(^{73}\)

In noting the absurdity of suspending prescription for all citizens under the auspice of *force majeure*, Troplong posited the following:

> I live in a town driven into a state of blockade during the span of a year, and 20 years still remain for me to escape the thirty year prescription of my right: is it not absurd that I would like to cover up my negligence in acting in this waiting period, by asking that the year under siege not be counted in the calculation of my thirty years? What major force paralyzed my hands, since for 20 years, I was able to repair this hurdle of time? . . . But when the creditor has had sufficient time to redress himself, "force majeure" is no longer a vain allegation, and the time thus lost, so easy to

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72. *Cour de Cassation* [Cass.] [highest court of ordinary jurisdiction] 1 Apr. 1829, Dalloz 1829, 206 ("L'Etat de guerre n'est pas un empêchement de force majeure, susceptible d'interrompre la prescription, lorsque le créancier, qui réclame le paiement de sa dette, a eu la faculté d'exiger ce paiement dans un autre lieu que celui declare en état de blocus." ("The state of war is not an impediment of force majeure, susceptible to the interruption of prescription, when the creditor, who demands the payment of his debt, had the ability to demand this payment in another place that he declared was blockaded.") (citing C. civ. 2251 (Fr.)) (author's translation)).

73. 2 M. TROPLONG, *Droit Civil Explique : De la Prescription*, no. 728, at 299 (1857) (author's translation) ("[S]i l'empêchement provenant de la guerre et de la peste se manifeste dans un temps intermédiaire et non voisin de l'échéance de la prescription, on ne doit pas en tenir compte, si, depuis que le créancier est rendu à la liberté d'agir, il a eu tout le temps nécessaire pour forcer son débiteur au paiement . . . .")
repair, just as the time of an apoplexy, or fever, or grief. The time of prescription is in effect regulated by law, with sufficient latitude and favor, so that it is not necessary that every day should be absolutely necessary. 74

Despite continued jurisprudential enthusiasm for the doctrine, the redactors of the French Civil Code intended to reject it by excluding it. 75 Many commentators believed the redactors were correct in doing so, as “admit[ting] the existence of the rule Contra non valentem is to go against the very text of Art. 2251. It would bring back all the known abuses of our old decisional law.” 76 Still, French courts continued to acknowledge and apply contra non valentem in its broadest sense. One decision from the Cour de Cassation noted that “prescription does not run against a person who can not act as a result of any impediment, whether its source is law, contract or act of God.” 77

Today, article 2251 of the French Civil Code remains unchanged from its original redaction, stating that “[p]rescription runs against all persons, unless they come within some exception established by

74. Id. (author’s translation) (“J’habite une ville mise en état de blocus pendant l’espace d’un an, et vingt années me restent encore pour échapper à la prescription trentenaire de mon droit: ne serait-il pas ridicule que je voulussé couvrir ma négligence à agir dans ce délai, en demandant de ne pas compter l’année de siège (sic) dans le calcul des trent ans? Quelle force majeure m’a donc paralysé les mains, puisque, pendant vingt ans, j’ai pu réparer cet obstacle d’un moment? . . . Mais quand le créancier a pu se relever en temps utile et reprendre ses avantages, la force majeure n’est plus qu’une vaine allégation, et l’on doit lui compter cette année qu’il a perdue et qu’il lui était si facile de réparer, tout aussi bien que le temps d’une apoplexie, d’une fièvre cérébrale, d’une agonie. Le temps des prescriptions est, en effet, régé par la loi avec assez de latitude et de faveur pour qu’il ne soit pas nécessaire que tous les jours soient absolument utiles.”).

75. BAUDRY-LACANTINERIE & TISSIER, supra note 55, NO. 368, at 193.

76. Id. Article 2251 of the French Code Civil states: “Prescription runs against all persons, unless they come within some exception established by law.” (author’s translation) (“La prescription court contre toutes personnes, à moins qu’elles ne soient dans quelque exception établie par une loi.”). C. civ. art. 2251 (1924) (Fr.).

Even though there is no mention of "absolute impossibility" in the code, French jurisprudence has firmly established and continues to hold that "[p]rescription does not run against one who absolutely cannot act, as a result of whatever impediment resulting from law, from agreement or from force majeure."

III. EXTENDING LIMITATION OF ACTIONS IN OTHER JURISDICTIONS

A. Contra Non Valentem in Other Civil Law Jurisdictions

Two jurisdictions, Québec and Argentina, are helpful in molding a more complete analysis of contra non valentem. Québec’s treatment of the doctrine is useful for two reasons: first, its commentators were just as dismissive as the French were in applying the doctrine where there was a factual impediment to prescription because they presumed that the legislature would act affirmatively to address the issue; second, the law in Québec thoroughly evaluates whether the impediment to prescription is couched in terms of "impossibility" or "absolute impossibility." Argentine law is helpful to our analysis because it illustrates the need to tailor judgments of factual impediments on a case-by-case basis.

78. C. civ. art. 2251 (2007) (Fr.) (author’s translation) ("La prescription court contre toutes personnes, à moins qu’elles ne soient dans quelque exception établie par une loi.").
1. Québec

Although no Québec statute endorses *contra non valentem* by name, Québec’s civil code is among the codes most supportive of the principle behind the doctrine. On causes that suspend prescription, the Civil Code of Lower Canada formerly indicated that “[p]rescription runs against all persons, unless they are included in some exception established by this code, or unless it is *absolutely impossible* for them in law or in fact to act by themselves or to be represented by others.” Commentator Pierre Martineau acknowledged that this article was in fact *contra non valentem*. While the framers of the French Civil Code refused to include the “impossibility to act” provision despite continued jurisprudential endorsement, the commissioners appointed to codify the laws of Lower Canada included it in Title Nineteenth of Book Third of the Civil Code of Lower Canada. Commissioners of both the French and Lower Canadian civil codes were aware of the limits that *contra non valentem* would place on prescription if such a general provision were introduced, especially in light of precautions by French commentators. Nevertheless, the commissioners of the Civil Code of Lower Canada included the “impossibility to act” as a cause of suspension of prescription tempered by “absolute impossibility.”

As amicable as the Civil Code of Lower Canada’s endorsement of the principle of *contra non valentem* might seem to proponents of the maxim, doctrinal and jurisprudential criticism of the article’s practical application had at one point significantly curtailed it.

81. MARTINEAU, supra note 71, NO. 343, at 353.
82. THIRD REPORT OF THE COMMISSIONERS APPOINTED TO CODIFY THE LAWS OF LOWER CANADA, Reports 1–3, at 531 (George E. Desbarats ed. 1865) [hereinafter THIRD REPORT] (“Prescription runs against all persons, unless they be specially exempt according to law or the established jurisprudence, or that they are unable to act.”).
84. THIRD REPORT, supra note 82, Reports 1–3, at 531 (“Prescription runs against all persons, unless they be included in some exception established by this code, or unless it be *absolutely impossible* for them in law or in fact to act by themselves or to be represented by others.” (emphasis added)).
Though it ultimately adopted a less restrictive definition of impossibility, the *Gauthier v. Beaumont* court commented on the instant article and “stressed the word ‘absolutely’ at the outset because it must be given its ordinary meaning of ‘allowing for no restriction, alleviation, or exception’; if the legislature included it in the article, it intended to say something, and the article has been interpreted accordingly.”

Commentators generally noted the significance of the word “absolutely” with varying degrees of strict interpretation. For example, Mignault only imagined “absolute impossibility to act” in the most extreme cases; however, he does not go so far as other commentators have in requiring that impossibility be imposed by some superior force.

These commentators seem to have mirrored their French brethren by generally discounting any practical application of


86. 9 MIGNAULT, *supra* note 27, at 452–53 (“Du reste, l’impossibilité d’agir doit être absolue, mais elle peut exister en droit ou en fait. Comme je viens de le dire, je crois que notre code énonce tous les cas d’impossibilité d’agir ‘en droit.’ L’impossibilité d’agir ‘en fait’ échappe à toute définition. Elle ne résulterait pas de l’absence, et pas même, à mon avis, de l’emprisonnement dans une maison de détention. Cependant, elle pourrait exister si le créancier ou le propriétaire subissait une contrainte telle qu’il serait absolument privé de moyens d’action, mais ce cas est tellement extraordinaire qu’il ne s’est jamais, que je sache, présenté dans la pratique.” (“For the rest, the impossibility to act must be absolute, but it can exist *in right* or *in fact*. Like I just said, I believe that our code lays out all the cases of impossibility to act “*in right.*” The impossibility to act “*in fact*” escapes all definition. It couldn’t result from absence nor, in my opinion, from imprisonment in a penitentiary. However, it could exist if the creditor or the owner are under a constraint where he was absolutely deprived of a mode of action, but this case is so extraordinary that it has never, that I know of, been presented in practice.”) (author’s translation)).

"impossibility to act in fact," yet a deeper analysis reveals that their discussions focus on the jurisprudence and shy away from imaginative hypothesizing. In identifying "kidnapping" as a lone practical example to the "impossibility to act in fact," Martineau commented on how even war may not sufficiently suspend prescription. Martineau discounted any deep study of crises like war that could suspend prescription as merely academic because he believed that Québec's legislature would step in to suspend prescription just as France's legislature suspended prescription during the First and Second World Wars.

To assume that the legislature would act affirmatively to solve Louisiana's prescriptive woes was proven unwise, as the legislature's tardiness in suspending prescription has created problems of impermissibly retroactive legislation. While these commentators may have held a narrow position on what events could stand as an "impossibility to act in fact," one could forgive them for failing to foresee the complexities of the ramifications of Hurricanes Katrina and Rita in 2005. Royds, another commentator, likewise cited kidnapping as a lone conceivable example of impossibility in fact but was not foreclosed to other possible examples, stating that "our jurisprudence isn't always in accord with the doctrine." Hurricanes Katrina and Rita are prime examples of events that will force the jurisprudence to evolve beyond examples illustrated in doctrine.

Contra non valentem continued to be "enshrined in both the Civil Code of Lower Canada (article 2232) and in [Québec's]

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88. MARTINEAU, supra note 71, NO. 216, at 218–19. See also 2 TROPLONG, supra note 73, NO. 728, at 299.

89. MARTINEAU, supra note 71, NO. 216, at 219 ("En France, des lois spéciales ont été adoptées pour suspendre les prescriptions durant les guerres de 1914–1918 et de 1939–1945. Le législateur québécois agirait sans doute de même dans une situation identique; la question de déterminer si la guerre et l'invasion constituent des cas d'impossibilité d'agir prendrait alors un caractère académique." ("In France, the special laws were adopted in order to suspend prescription during the wars of 1914–1918 and of 1939–1945. The Québécois legislature would react, without doubt, in the same way in an identical situation; the question to determine if the war and the invasion constitute cases of impossibility to act would be academic in character.") (author's translation)).

90. RODYS, supra note 87, at 195 (author's translation) ("[N]otre jurisprudence n'est pas toujours d'accord avec la doctrine.").
Because the Civil Code of Lower Canada retained the principle of the doctrine while the French code did not, some Québec courts veered away from French doctrine and jurisprudence for guidance on the subject. Indeed, it seems as if Québec chose to endorse the doctrine notwithstanding heavy criticism by its French ancestors and brethren.

Recodification of the Civil Code of Lower Canada into what is now the Québec Civil Code changed the article significantly. The Québec legislature modified article 2232 from the Civil Code of Lower Canada to reflect the new, less restrictive interpretation from *Gauthier v. Beaumont* by eliminating the word “absolutely” from “absolutely impossible” in the new article as it appeared in Civil Code of Québec. The substance of article 2232 is retained in current article 2904 of the Civil Code of Québec: “Prescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others.” A number of decisions have acknowledged the revision as a less restrictive provision allowing the suspension of prescription under “impossibility in fact.”

The revision also permits more judicial discretion in

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95. *See, e.g.*, Québec (Ville) c. Constructions Bé-Con inc., [2003] CarswellQue 4652 (Can.) (recognizing the ignorance of a legal action sufficient to suspend prescription when the defendant’s behavior contributed to the perpetuation of the ignorance); Ringuette c. Ringuette, [2003] CarswellQue 799 (Can.) (recognizing that article 2904 could not apply retroactively but deciding nevertheless that the psychological trauma caused by the defendant-brother’s sexual molestation of the plaintiff-sister presented an absolute impossibility to act sufficient to suspend prescription under both former article 2232 and new article 2904); Handfield c. Laporte, [2002] CarswellQue 2723 (Can.) (denying the plaintiff’s plea of impossibility to act in fact when the defendants were not the cause of his psychological disabilities and because expert testimony showed that his psychological problems did not prevent him from taking cognizance of his ability to pursue an action); Jean-Guy Longtin c. Lise Plouffe, [2001] R.J.Q. 2635, 2649 (Can.) (recognizing the looser standard of “impossibility to act in fact” and suspending the prescriptive period for a plaintiff whose diminished cognitive abilities prevented her from pursuing her action until third parties helped her to appreciate the consequences of her actions); Fiducie Desjardins inc. c. Cité Poste
deciding whether a factual impediment is sufficient to suspend prescription.  

Massaging the definition of “impossibility in fact” and determining whether there should be an “absolute” component to it is indeed an important consideration in Louisiana in light of Hurricanes Katrina and Rita. The degree to which the hurricanes impeded any particular litigant undoubtedly varied greatly. Louisiana judges should carefully consider how much latitude they are willing to afford litigants in balancing the factual impediment to prescription and the value of prescription itself.

2. Argentina

Article 3980 of the Argentine Civil Code (Código Civil Argentino) specifically provides for the application of contra non valentem in terms of “impossibility to act in fact.” The article states:

When the enforcement of an action was temporarily impeded due to difficulties or impossibility of fact, the judges are authorized to release the creditor, or the owner, from the consequences of the prescription that occurred during the impediment, if after its cessation the creditor or owner had exercised his rights in a period of three months.

inc., [1999] CarswellQue 443 (Can.) (recognizing fraud as a factual impediment sufficient to suspend prescription until the plaintiffs discovered the fraud); Droit de la Famille, [1996] R.J.Q. 2981, 2992 (Can.) (allowing the suspension of prescription for the disavowal of paternity four years after the child’s birth, when the wife told the husband there was a chance he was not the father and there was no way for the father to know the truth until he learned the results of the DNA test).

96. See, e.g., Jean-Guy Longtin, [2001] R.J.Q. at 2649 (Can.) (“À notre avis, cette modification confère au tribunal une certaine discrétion dans l’appréciation et l’application de cette notion.” (“In our view, this modification confers on the court a certain discretion in the appreciation and application of this notion.”)) (author’s translation); Droit de la Famille, [1996] R.J.Q. at 2992 (Can.) (“Le nouveau code est donc moins exigeant en matière de prescription, car il suggère comme règle générale une attitude de souplesse envers ceux qui sont dans l’impossibilité d’agir.” (“The new code is then less demanding in the matter of prescription, because it suggests as a general rule an attitude of flexibility towards those who are in the impossibility to act.”)) (author’s translation)).
If the creditor had not filed the claim that interrupted the prescription, due to deceitful activities of the debtor that aimed to delay the prescription, the judges will be able to apply what is established in this section.  

This article formerly indicated that the filing of suit was due immediately following the cessation of the factual impediment, though a revision to the article in 1968 (illustrated above) allowed for a three month suspension of prescription following the removal of the factual impediment.

The determination of whether a factual impediment prevented a plaintiff from meeting his prescriptive deadlines is to be made by the judge in each particular case. Argentine courts have noted that judges should exercise the utmost prudence in evaluating whether a factual impediment exists. A significant portion of Argentine

97. CÓDIGO CIVIL ARGENTINO [CÓD. CIV.] art. 3980 (2007) (Arg.) (Agustin Parise trans.), available at http://www.infoleg.gov.ar/infolegInternet/anexos/105000109999/109481/texactley340_libroIV_S3_titulol.htm (“Cuando por razón de dificultades o imposibilidad de hecho, se hubiere impedido temporalmente el ejercicio de una acción, los jueces están autorizados a liberar al acreedor, o al propietario, de las consecuencias de la prescripción cumplida durante el impedimento, si después de su cesación el acreedor o propietario hubiese hecho valer sus derechos en el término de tres meses. Si el acreedor no hubiere deducido la demanda interruptiva de la prescripción por maniobras dolosas del deudor, tendientes a postergar aquélla, los jueces podrán aplicar lo dispuesto en este artículo.”).

98. Regarding the understanding of “immediate,” there have been different jurisprudential interpretations.

99. Art. 3980 (Arg.) (“Cuando por razón de dificultades o imposibilidad de hecho, se hubiere impedido temporalmente el ejercicio de una acción, los jueces están autorizados a liberar al acreedor, o al propietario, de las consecuencias de la prescripción cumplida durante el impedimento, si después de su cesación el acreedor o propietario hubiese hecho valer sus derechos inmediatamente.”) (“When the enforcement of an action was temporarily impeded due to difficulties or impossibility of fact, the judges are authorized to release the creditor, or the owner, from the consequences of the prescription that occurred during the impediment, if after its cessation the creditor or owner had exercised his rights immediately.”) (Agustin Parise trans.).


jurisprudence in the last thirty years commenting on article 3980 concerns a period between 1976 and 1983, when the military seized control of the state with the Proceso de Reorganización Nacional (Process of National Reorganization). Just as Troplong argued that the mere occurrence of a national crisis without more should not suspend prescription for an entire nation, Argentine courts were unwilling to apply article 3980 in cases where only the state seizure, without more, was the claimed reason for failing to comply with the applicable prescriptive periods. Courts must look at facts specific to the individual litigant in evaluating whether a factual impediment is sufficient to suspend prescription under article 3980. Although the article does not mention "absolute impossibility in fact" as other civil law jurisdictions do, Argentine courts are interested in whether the factual impediment is of the variety that would prevent


102. The search was composed from the following law journals: La Ley, El Derecho, and Jurisprudencia Argentina.


104. 2 TROPLONG, supra note 73, NO. 728, at 299.

105. CSJN, 16/8/1988, “Troiani, Pedro N. v. Ford Motor Argentina, S.A.,” J.A. s/ despido (1988-III-87) (Arg.) (reasoning that the state seizure could not in and of itself be a factual impediment to satisfying prescriptive periods because public offices were open and people were able to continue their day-to-day activities).


107. For example, the Civil Code of Lower Canada formerly recognized that “[p]rescription runs against all persons, unless they are included in some exception established by this code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others.” C.C.B.-C. art. 2232 (1993) (Can.).
a litigant from meeting his prescriptive period. In commenting on whether sickness may constitute a factual impediment under article 3980, the *Miguel, Rodolfo v. Agua y Energía Eléctrica* court said it is one thing to be sick, another to be so sick as to be unable to work, and another to be so sick as to be unable to exercise an action. Ultimately, the article opens the possibility of equity according to the criteria of the judicial decision.

The case of *Troiani, Pedro N. v. Ford. Motor Argentina S.A.* illustrates the judiciary's power to decide whether a factual impediment warrants the suspension of prescription under article 3980 and when that factual impediment ceases to exist. The plaintiff claimed he was unable to file suit and meet the applicable prescriptive period because he had been illegitimately and arbitrarily detained as a prisoner during the period of military siege in the late 1970's and early 1980's. The plaintiff was released from prison on December 1, 1980, but claimed that he was further prevented from filing suit until March 9, 1984, just after President Raúl Alfonsín came to power and restored democracy on December 10, 1983. The court agreed that a factual impossibility continued to exist for the plaintiff after his release from prison and during the period of military control; however, the majority opinion identified

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111. *Id.*


the date of the presidential election (October 30, 1983)\textsuperscript{115} as the date when the factual impossibility ceased to exist, whereas the dissent marked the date President Raúl Alfonsín assumed power (December 10, 1983).\textsuperscript{116} That date is important, as article 3980 permits the plaintiff up to three months to exercise his action after the removal of his factual impediment. While the date identified by the majority opinion rendered the plaintiff’s action prescribed by more than three months, the plaintiff would have been able to exercise his action a day before it prescribed under the dissent’s view.

The judicial discretion afforded by article 3980 and the spirit of \textit{contra non valentem} it embodies seems substantial, but it likewise offers a more equitable solution to the suspension of prescription superior to blanket legislative action. This is precisely the judicial discretion that was warranted in the aftermath of Hurricanes Katrina and Rita. Just as some Argentine litigants were more severely affected by the military occupation than others, the hurricanes had a wide range of effects on litigants throughout Louisiana. Had Louisiana more enthusiastically embraced \textit{contra non valentem} instead of yielding to the legislative suspension of prescription, judges would have equitably evaluated claims of factual impediments to prescription on a case-by-case basis.

\textbf{B. Suspending and Tolling Statutes of Limitation in Common Law Jurisdictions}

An overview of how common law jurisdictions address impediments to statutes of limitation is useful for the development of the law in Louisiana, as Louisiana is a mixed jurisdiction of both the civil and common law. This section evaluates the suspension of statutes of limitation in four states: New York, for its exhaustively detailed contingency plan for a state of emergency and how it was implemented following the September 11th terrorist attacks; Mississippi, for its solution to extend statutes of limitation following Hurricane Katrina; California, as an outlier permitting the retroactive revival of claims that expired under statutes of limitation;

\textsuperscript{115. \textit{Id.}}
and Florida, for its allowance of local courts to suspend or toll legal deadlines.

1. New York

As unprepared as it would seem New York and the rest of the world were for the terrorist attacks of September 11th, New York already had a comprehensive body of law available to state officials in the event of such a disaster. New York lawmakers had prepared a provision addressing the suspension of statutes of limitation in the event of a natural or man-made disaster, which allowed the governor to issue an executive order “suspend[ing] specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.” The statute limited the governor’s power in many ways, including a time limitation of thirty days and a requirement that the order deviate only minimally from the requirements of the statute.

The day after the September 11th attacks, Governor George Pataki exercised his emergency power to issue a series of executive orders, including Executive Order 113.7, to temporarily suspend the statutes of limitation on civil actions “so far as it bars actions whose limitation period concludes during the period commencing from the date that the disaster emergency was declared . . . until further notice.” A month later, the Governor cut off the general suspension of the statutes of limitation but extended the suspension

117. N.Y. EXEC. LAW §§ 20–29-g (McKinney 2006).
118. Id. § 29-a(1).
119. Id. § 29-a(2)(a) (“[N]o suspension shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each . . . ”).
120. Id. § 29-a(2)(e) (“[A]ny such suspension order shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the disaster action deemed necessary . . . ”).
for those persons directly affected by the disaster until November 8, 2001, under Executive Order 113.28.122

To date, there have been no direct challenges to Executive Orders 113.7 or 113.28 insofar as they suspend statutes of limitation in any reported decisions.123 Some litigants have incorrectly interpreted the statute as a tolling provision;124 however, courts have clarified that the suspension of certain limitation periods applied only to those claims that “concluded during the period the Executive Order was in effect.”125

Two issues are worth noting in connection with Governor Pataki’s order. First, it was imperative that the Governor, as a representative of the executive branch, take action to suspend the time period applicable to statutes of limitation because New York law prohibits courts from “extend[ing] the time limited by law for the commencement of an action.”126 Second, the Governor’s immediate response barred any challenge to the retroactive revival of expired claims. Governor Pataki’s intrepid use of his authority eliminated the need for litigants to apply anything resembling contra non valentem (which is, of course, a doctrine foreign to New York). One must consider that executive or legislative action is not always so squarely applied. As effective as these executive orders were for New York, non-judicial action is still plagued by the potential for retroactivity, if not timely implemented, and overbreadth, if not narrowly tailored.

122. Id.
124. See, e.g., Scheja v. Sosa, 771 N.Y.S.2d 554 (N.Y. App. Div. 2004) (explaining that the Governor’s Executive Order only suspended statutes of limitation for claims that would have expired during the stated period and did not operate as a tolling provision of general applicability interrupting any litigant’s statute of limitations). A tolling statute is defined as “[a] law that interrupts the running of a statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction.” BLACK’S LAW DICTIONARY 1525 (8th ed. 2004).
125. See, e.g., Scheja, 771 N.Y.S.2d at 555.
2. Mississippi

Mississippi's guidance on the suspension of statutes of limitation is relevant in that, like Louisiana, its Gulf Coast communities were significantly affected by Hurricane Katrina. Despite its veteran experience with hurricanes, Hurricane Katrina is the only storm to date that has caused Mississippi lawmakers to take actions in response to the problems that would invariably cripple its court system in certain areas.

On September 6, 2005 (one week after the storm struck), the Supreme Court of Mississippi issued an emergency administrative order to extend all legal deadlines and cancel oral arguments in the Second (Southern) Supreme Court District in addition to authorizing trial courts to "exercise their sound discretion in extending deadlines, rescheduling hearings and trials and any other matters by case specific actions or by general orders . . . ." The court was careful not to overextend its power, as it explicitly stated that it was without authority to extend statutes of limitation and that "no extension granted or authorized [in the administrative order] shall extend beyond the limitations of action set by statute."

Over a month after Hurricane Katrina made landfall, the Mississippi legislature amended a statute permitting the removal of local governments in emergency situations to include "natural disasters" as one such "emergency situation." The statute was

127. Eleven tropical depressions, tropical storms, or hurricanes have affected the three Mississippi coastal counties (Hancock, Harrison, and Jackson) since 1956. NOAA Coastal Services Center, Historical Hurricane Tracks, http://maps.csc.noaa.gov/hurricanes/viewer.html (last visited Oct. 15, 2007) (query "Place name," "County," "Category," "Distance (10)," and "Date").
128. MISS. CODE ANN. § 9-3-1 (West 2006) (explaining that the Second Supreme Court District of Mississippi comprises the following counties: Adams, Amite, Clarke, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Jackson, Jasper, Jefferson Davis, Jones, Lamar, Lawrence, Lincoln, Marion, Pearl River, Perry, Pike, Simpson, Smith, Stone, Walthall, Wayne, and Wilkinson).
130. Id.
131. MISS. CODE ANN. § 17-7-1 (West 2006). Mississippi Code section 17-7-1 formerly only allowed for the removal of local governments during an emergency resulting from the effects or anticipated effects of an enemy attack or a threat of an enemy attack. MISS. CODE ANN. § 17-7-1 (West 2004). The Mississippi
given retroactive effect to August 29th (the day Hurricane Katrina struck).\footnote{2005 Miss. Laws 5th Ex. Sess. ch. 8.} The Mississippi legislature concurrently modified statutes of limitation for claims set to expire between August 29, 2005 and October 6, 2005, in the Second (Southern) Supreme Court District as follows:

(a) If the statute of limitations expired on or after Monday, August 29, 2005, but before the effective date of this act, then the time for filing a claim shall be extended to Friday, December 30, 2005.

(b) If the statute of limitations expires on or after the effective date of this act, but before Tuesday, November 29, 2005, then the time for filing a claim shall be extended to Friday, December 30, 2005.\footnote{Id.}

Additionally, the Mississippi legislature permitted claims properly filed in the rest of the state (the First and Third Supreme Court Districts) to benefit from these time modifications upon a showing that “but for the catastrophic effects of Hurricane Katrina, the action would have been timely filed.”\footnote{Id.} The order was effective immediately upon its passage and, by the face of its text, retroactively revived expired claims.\footnote{S. Ct. Miss. Admin. Order No. 2005-AD-00001 (Sept. 6, 2005).} To date, there are no known or reported decisions challenging this legislation. Considering the tendency of most jurisdictions to refuse to retroactively revive expired claims, it is unlikely that a Mississippi court would find this statute valid insofar as it breathes life back into claims beyond their applicable limitation period. This is in fact the law in Mississippi, where the only effect of legislation lengthening a statute of limitation is to extend claims in the future or then existing claims—\textit{not} to revive expired claims, regardless of the retroactive language legislature amended the statute in 2005 to add “natural disaster” as an “emergency situation.” 2005 Miss. Laws 5th Ex. Sess. ch. 4.
of the legislation.\textsuperscript{136} The Mississippi Supreme Court articulated this distinction, noting that:

"[M]ost other jurisdictions recognize the authority of legislatures to enlarge periods of limitation with respect to existing claims, that is, claims not barred at the time of elongation. This is consistent with our general principle that an act remedial in its character embraces claims existing when the act was passed." While not completely retroactive, this exception gathers the claims pending at the time of the statute's amendment and not barred by its previous limitation and gives them the benefit of the longer limitations period.\textsuperscript{137}

Likewise, Louisiana courts have specifically prohibited the retroactive revival of prescribed claims, as will be discussed shortly.\textsuperscript{138}

3. California

The California legislature has taken two remarkable steps to modify statutes of limitation arising out of the September 11th terrorist attacks and the Northridge earthquake of 1994. In 2002, the California legislature noted that its current one-year statute of limitations period for "actions for assault, battery, or injury to, or for the death of, a person caused by the wrongful act or neglect of another . . . [was] unduly short" and extended this period to two years.\textsuperscript{139} The legislature noted the "special injustice" of applying a one-year statute of limitations against victims of the September 11th terrorist attacks by specifically applying the change in the law retroactively to those victims.\textsuperscript{140} Additionally, the law applies

\textsuperscript{136} Tie-Reace Hollingsworth ex. rel. McDonald v. City of Laurel, 808 So. 2d 950, 954 (Miss. 2002). See also Univ. of Miss. Med. Ctr. v. Robinson, 876 So. 2d 337, 340 (Miss. 2004) ("[W]here an amended statute remedially lengthens a statute of limitations, [we] will apply the amendment to existing causes." (citations omitted)).

\textsuperscript{137} Tie-Reace, 808 So. 2d at 954 (citations omitted) (quoting Kilgore v. Barnes, 508 So. 2d 1042, 1045 (Miss. 1987) (citations omitted)).

\textsuperscript{138} See infra note 189 and accompanying text.

\textsuperscript{139} 2002 Cal. Legis. Serv. ch. 448 (West).

\textsuperscript{140} Id.
It is important to note that, although the law had retroactive application, its enactment on the day before the first anniversary of the September 11th terrorist attacks avoided the retroactive revival of any expired claims.\textsuperscript{142}

Careful avoidance of reviving expired claims was not taken when the California legislature modified statutes of limitation for insurance claims arising out of the Northridge earthquake of 1994, as it was the explicit intent of the California legislature to revive expired claims in response to widespread mishandling of insurance claims\textsuperscript{143} when it set forth a new one-year statute of limitations from January 1, 2001.\textsuperscript{144} The act applied only to those cases "in which an insured contacted an insurer or an insurer’s representative prior to January 1, 2000, regarding potential Northridge earthquake damage" and did not apply to claims that had been "litigated to finality" or settled.\textsuperscript{145} The statute’s author intended for the statute to "provide [those] individuals who . . . were victimized twice, (once by the earthquake and a second time by their insurance companies) with a reasonable ‘second chance’ to seek redress for their damages."\textsuperscript{146}

The retroactivity of this law is startling, as it revives claims that have been expired for nearly six years. This is so because California law provides that

the one-year limitations period begins to run at the time of the inception of the loss, which is “that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.”\textsuperscript{147}

\textsuperscript{141} CAL. CIV. PROC. CODE § 340.10 (2003).
\textsuperscript{142} 2002 Cal. Legis. Serv. ch. 448 (West).
\textsuperscript{144} 2000 Cal. Legis. Serv. ch. 1090 (West).
\textsuperscript{145} CAL. CIV. PROC. CODE § 340.9 (2001).
\textsuperscript{146} 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 627 n.21 (Cal. Ct. App. 2001) (quoting S. 1899, 106th Cong. (as read by S. Comm. on the Judiciary, July 6, 2000)).
\textsuperscript{147} Campanelli v. Allstate Life Ins. Co., 322 F.3d 1086, 1094 (9th Cir. 2003) (quoting Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230 (Cal. 1990)).
In the case of the Northridge earthquake, the inception of the loss was the day of the earthquake (January 17, 1994).\textsuperscript{148}

California courts have maintained the validity of this retroactive legislation against a number of challenges. Amidst concern that the statute violated the contracts clauses of both the U.S. Constitution\textsuperscript{149} and the California Constitution,\textsuperscript{150} the court in \textit{Campanelli v. Allstate Life Insurance Co.} evaluated the statute under the standard set out in \textit{Energy Reserves Group, Inc. v. Kansas Power & Light Co.}\textsuperscript{151} \textit{Energy Reserves} held that a state regulation that creates a substantial impairment of contract is constitutional if the state has a "significant and legitimate public purpose behind the regulation."\textsuperscript{152} Finding such a significant public purpose in light of the "highly-regulated nature of the California insurance industry and the statutory underpinnings of the contractual limitations clause," the \textit{Campanelli} court held that the statute's "interference with contracts, while substantial, is not so severe as to render the statute unconstitutional."\textsuperscript{153}

The court in \textit{20th Century Insurance Co. v. Superior Court} went to great lengths to show that the California legislature "has the power to expressly revive time-barred civil common-law causes of action."\textsuperscript{154} The court noted that retroactive modification of the statute was permissible because a mere "statute of limitations . . . does not, upon its expiration, endow in the defendant a 'vested right.'"\textsuperscript{155} It should be noted that this view is remarkably distinguished from other jurisdictions and is expressly rejected in the Louisiana jurisprudence.\textsuperscript{156}

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\textsuperscript{148} \textit{Id.}
\textsuperscript{149} U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . law impairing the obligation of contracts.").
\textsuperscript{150} CAL. CONST. art. I, § 9 ("[A] law impairing the obligation of contracts may not be passed.").
\textsuperscript{152} 459 U.S. at 411–12.
\textsuperscript{153} 322 F.3d at 1098–99.
\textsuperscript{155} \textit{Id.} at 631 (emphasis in original).
\textsuperscript{156} \textit{See infra} note 189 and accompanying text.
\end{flushleft}
4. Florida

The frequent barrage of hurricanes in the state of Florida has routinely caused court closures. Such events are undoubtedly not only inconvenient for Floridians in general but also particularly problematic for plaintiffs whose claims are set to expire under applicable statutes of limitation. In light of major storms such as Hurricane Andrew, which struck the Florida coast in 1992, the Florida Supreme Court amended the Florida Rules of Court to allow the Chief Justice to order court closures and to "suspend, toll, or otherwise grant relief from time deadlines imposed by otherwise applicable statues and rules of procedure for such period as may be appropriate . . . ."\textsuperscript{157} The Chief Justice may make such orders upon request of the chief judge of any circuit or district, or sua sponte, in the event of natural disaster, civil disobedience, or other emergency situation requiring the closure of courts or other circumstances inhibiting the ability of litigants to comply with deadlines imposed by rules of procedure applicable in the courts of [Florida].\textsuperscript{158}

The vast majority of court closures in Florida are the consequence of hurricanes and tropical storms. Between 1999 and 2006, the Chief Justice issued 250 administrative orders extending legal deadlines retroactively for state courts in response to hurricanes or tropical storms,\textsuperscript{159} though the Chief Justice has also issued administrative orders for such non-hurricane related emergencies as power outages,\textsuperscript{160} anthrax scares,\textsuperscript{161} bomb threats,\textsuperscript{162}

\begin{footnotesize}
\begin{enumerate}
\item[157.] Amendments to the Florida Rules of Judicial Administration, 682 So. 2d 89, 93 (1996).
\item[158.] Fla. R. Jud. Admin. 2.030(a)(2)(B)(iv) (2006). In 2006, this rule was renumbered as Rule 2.205(a)(2)(B)(iv), but is referred to as Rule 2.030 in the administrative orders discussed infra.
\item[159.] These orders may be found at the website of the Florida Supreme Court Clerk's Office, Administrative Orders, http://www.floridasupremecourt.org/clerk/adminorders/index.shtml (last visited Dec. 13, 2007).
\item[162.] S. Ct. Fla. Admin. Order No. AOSC02-7 (Apr. 1, 2002).
\end{enumerate}
\end{footnotesize}
terrorist activity in general, public demonstrations congesting areas around courtroom facilities, and even offensive odors.

Each of the Chief Justice’s administrative orders was issued after the actual courthouse closing; likewise, each order retroactively modified legal deadlines for varying periods of time. In addition to the specified deadline modifications, the majority of administrative orders indicated that local courts may make case-by-case determinations of special instances where an attorney needs to further extend a legal deadline as a direct result of the named impediment. Furthermore, most administrative orders allow for a local case-by-case determination to toll legal deadlines in areas not listed in the order upon a showing that an attorney’s lack of compliance with the requisite time periods was directly attributable to the named impediment. The orders are essentially a hybrid of a blanket suspension to the limitation period (the administrative order identifying particular dates) and a case-by-case determination of whether a particular litigant may benefit from a longer delay period. The latter point embodies the principle of contra non valentem, whereas the former point suffers the same problems of overbreadth and impermissible retroactivity discussed throughout this Comment.

It is important to note that no reported decisions have challenged the Florida Supreme Court’s power to modify legal deadlines,

166. See supra note 124 for a discussion on the distinction between tolling periods and suspension.
167. See, e.g., S. Ct. Fla. Admin. Order No. AOSC05-78 (Nov. 1, 2005) (“This Court recognizes that there may be instances where, because of this Hurricane, these and other time limits in the Third District Court of Appeal could not be met even after taking into consideration the tolling of the periods stated above. If such a claim is made, it shall be resolved by the court wherein jurisdiction lies on a case-by-case basis where a party demonstrates that the lack of compliance with requisite time periods was directly attributable to this emergency situation.”).
168. See, e.g., id. (“The Court likewise recognizes that cases outside the Third District Court of Appeal may also be affected by this emergency situation. Consequently, the tolling of time periods in cases outside of the Third District Court of Appeal shall be permitted only where a party demonstrates that the lack of compliance with requisite time periods was directly attributable to this emergency situation.”).
including suspending or tolling statutes of limitation, under Florida Rule of Judicial Administration 2.030(a)(2)(B)(iv); however, it is well-settled in Florida that "although the legislature possesses the power to extend the limitation period for an existing cause of action, it lacks the authority to breathe life into a claim that is lifeless as a result of a pre-existing statute." 169 This is so because "[o]nce a claim has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant." 170 It follows that the tolling or suspension periods would have no enforceable effect on claims that expired during the period of time the courthouse is closed.

Additionally, in keeping with a plain reading of jurisprudential authority prohibiting the retroactive revival of expired claims, the words *nunc pro tunc* 171 included in each of the administrative orders would have no bearing on expired claims. What, then, is the effect of a *nunc pro tunc* administrative order tolling or suspending statutes of limitation for claims that have already expired? While it is of no practical significance and likely not the true intent of the rule, it is likely that administrative orders merely toll or suspend statutes of limitation for active claims that have not yet expired.

In Florida, it is permissible for the legislature to extend statutes of limitation for those claims that have not yet expired. 172 For example, a claim with a one-year statute of limitation period that accrues on September 1st may benefit from an administrative order tolling the statute of limitations for four days in response to a


170. *In re Estate of Smith*, 685 So. 2d at 1210. See also Mason v. Salinas, 643 So. 2d 1077 (Fla. 1994).

171. The Administrative Orders discussed are *nunc pro tunc* orders, which means that they have "retroactive legal effect through a court's inherent power." BLACK'S LAW DICTIONARY 1100 (8th ed. 2004).

hurricane in August, allowing the plaintiff's attorney until September 5th of the following year to file a claim. Without further judicial guidance, it is unclear what effect the administrative orders have on claims set to expire during the court closures when issued after the court closures. In any event, it is settled law that retroactively reviving prescribed claims is prohibited in Louisiana.173

Florida's veteran experience with hurricanes and the need for judicial efficiency understandably favors a mechanism like Rule 2.030, which allows the Chief Justice to suspend or toll legal deadlines for everyone in a designated locality. By allowing the further extension of legal deadlines on a case-by-case basis, Florida law recognizes the need for equity that is embodied in the doctrine of contra non valentem. Louisiana's less frequent experience with hurricanes does not warrant a procedure like the one Florida implements so routinely; rather, contra non valentem is sufficiently applicable to any factual impediment a Louisiana litigant might encounter.

IV. CURRENT ISSUES WITH PRESCRIPTION AND CONTRA NON VALENTEM IN LOUISIANA

Legislative suspension of prescription presents two problems: first, the legislature only has a narrow window of time within which to suspend prescription before its action is either impermissibly retroactive or neglects claims that prescribed during or after the emergency event; and second, the issue giving rise to the suspension invariably affects litigants in different ways.

A. Impermissibly Retroactive Legislative Suspension of Prescription

One of the most significant reasons why contra non valentem is an important issue in Louisiana today is that Governor Blanco's three successive executive orders174 and their legislative
ratification \textsuperscript{175} retroactively revived prescribed claims, effectively depriving defendants of their \textit{vested rights}.

Louisiana Civil Code article 6 explains, "In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary."\textsuperscript{176} In commenting on the French Civil Code's version of this article, Planiol stated the significance of the principle of non-retroactivity:

It is the necessary safeguard of individual interests. There would be no security for private persons, if their rights, their fortune, their personal status, the effects of their acts and of their contracts, could be questioned or modified or suppressed at any moment because the law-maker had changed his mind.\textsuperscript{177}

If the legislature does express an intent to apply a substantive law retroactively, it may do so "only to the extent that it is constitutionally permissible"\textsuperscript{178} and only when there is an express intent by the legislature for such an "extreme exercise of legislative power."\textsuperscript{179} If a law is procedural in nature, it may not apply retroactively if it violates a vested right.\textsuperscript{180}

It is first important to clarify the distinction between \textit{progressive rights} and \textit{vested rights}. The former refers to rights that are in the

\textsuperscript{175} 2005 La. Acts No. 6, § 1 (enacting LA. REV. STAT. ANN. § 9:5821–35 (2006)).

\textsuperscript{176} LA. CIV. CODE ANN. art. 6 (2007). See also LA. REV. STAT. ANN. § 1:2 ("No Section of the Revised Statutes is retroactive unless it is expressly so stated.").

\textsuperscript{177} 1 PLANIOL, supra note 69, NO. 240, at 173.

\textsuperscript{178} LA. CIV. CODE ANN. art. 6 cmt. b (2007). See also Lott v. Haley, 370 So. 2d 521, 523 (La. 1979) ("[P]rocedural and remedial laws are not accorded retroactive effect where such retroactivity would operate unconstitutionally to disturb vested rights."); Guillory v. Guillory by & through Arceneaux, 615 So. 2d 975, 977 (La. App. 1st Cir. 1993) ("The test for determining the constitutional validity of a limitation statute is whether it allows a reasonable time for the assertion of the right or the enforcement of the obligation; the legislature is primarily the judge of the reasonableness of the time allowed.").


\textsuperscript{180} LA. CIV. CODE ANN. art. 6 cmt. c (2007).
process of being created, such as the right to ownership of land through acquisitive prescription. The latter refers to rights that have already been created, such as the right to avoid being sued after a liberative prescriptive period has already expired. A "progressive right" is thus not a right at all, but the term is useful to categorize rights that have not yet fully matured.

One commentator has noted that changing the prescriptive period while one is "in the process" of creating a right cannot be said to apply retroactively. Likewise, the suspension of prescription of a suit that has not yet prescribed cannot be said to have retroactively deprived one of a right because no right has yet been created. Planiol described the same general reasoning, stating that "a law is retroactive when it goes back to the past either to evaluate the conditions of the legality of the act, or to modify or suppress the effects of a right already acquired. Outside of those conditions, there is no retroactivity."

Regarding retroactivity and prescriptive periods, Planiol stated that "[w]hen a law modifies the duration of a prescription, either to lengthen it or to shorten it, prescriptions already accrued are not disturbed by it, but those which are running are affected by the change." This distinction is incredibly important,

[for while the defendant does not acquire anything during the running of the prescriptive period, once the time period has elapsed, the legislature grants the defendant the right to plead the exception of prescription in order to defeat the plaintiff's claim. Because the defendant acquires the right to plead the exception of prescription, a change in that right

182. *Id.* at 726–27.
184. 1 PLANIOL, *supra* note 69, NO. 248, at 177–78. This reasoning has been adopted by the Louisiana Supreme Court in *Elevating Boats*, 795 So. 2d at 1163.
constitutes a substantive change in the law as applied to the defendant.185

Louisiana courts have permitted the shortening and lengthening of prescriptive periods but have given greater scrutiny to the modification of a plaintiff’s “vested rights” than a defendant’s “progressive rights.” Extending a plaintiff’s prescriptive period before his claim prescribes gives the plaintiff more time to exercise his vested right, while it merely lengthens the requisite delay period for a defendant to exercise his progressive right (i.e., a pending right that is not yet vested). The court in Elevating Boats, Inc. v. St. Bernard Parish explained this reasoning by stating that an “extended prescriptive period does not negatively affect any rights that have accrued in favor of any party [because] the injured party . . . is the only party with any rights in the pursuit of the cause of action.”186

Judges have more rigorously evaluated statutes that shorten prescriptive periods because they substantially modify a plaintiff’s vested right while accelerating the time needed for a defendant to turn his progressive right into a vested right.187 If the legislature shortens the time period for a plaintiff to bring an action, the legislative action must pass constitutional muster by “allow[ing] a reasonable time for the assertion of the right or the enforcement of the obligation . . . . Unless the time allowed is so short as to amount to a denial of justice, the courts will not interfere.”188 This exercise by the courts is undoubtedly a double standard in favor of the plaintiff; however, it serves to accent the important distinction between progressive rights and vested rights, for when a plaintiff’s claim has expired, the defendant has acquired a vested right that may not be abrogated by the legislature. Relying on well-established jurisprudence and doctrine, the Louisiana Supreme

186. 795 So. 2d at 1163.
187. See id. at 1163 n.12 (citing Falgout v. Dealers Truck Equip. Co., 748 So. 2d 399, 407–08 (La. 1999); Lott v. Haley, 370 So. 2d 521, 524 (La. 1979)).
Court ruled in *Elevating Boats* that "the Legislature is without the authority to revive a prescribed claim."\(^{189}\)

Despite this clear language, Governor Kathleen Blanco\(^{190}\) and the Louisiana legislature expressly suspended prescriptive and peremptive periods for those claims that did or would have expired after Hurricanes Katrina and Rita:

A. All prescriptions, including liberative, acquisitive, and the prescription of nonuse, and all peremptive periods shall be subject to a limited suspension and/or extension during the time period of August 26, 2005, through January 3, 2006; however, *the suspension and/or extension of these periods shall be limited and shall apply only if these periods would have otherwise lapsed during the time period of August 26, 2005, through January 3, 2006.* This limited suspension and/or extension shall terminate on January 3, 2006, and any right, claim, or action which would have

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189. 795 So. 2d at 1164 (citing Bouterie v. Crane, 616 So. 2d 657, 664 n.15 (La. 1993); Hall v. Hall, 516 So. 2d 119, 120 (La. 1987)) (emphasis added). See also Raymond v. Orleans Parish Sch. Bd., 856 So. 2d 27, 36 (La. App. 4th Cir. 2003) ("At the time the second amended petition was filed, the School Board had obtained a vested right in being able to assert the exception of prescription. Therefore, based upon the jurisprudence of this State and due to the procedural mistakes discussed herein, La. R.S. 14(2)(13)(nn) may not be utilized to revive the appellants’ claim.").

190. 2005 La. Sess. Law Serv. Exec. Order Nos. 2005-32, -48, -67 (West). While the Governor claimed to have acted within her power during a state of emergency under Louisiana Revised Statutes section 29:724, there is nothing in that statute explicitly indicating that the Governor has the power to suspend prescription. Furthermore, Louisiana Civil Code article 3457 indicates that "[t]here is no prescription other than that established by legislation." LA. CIV. CODE ANN. art. 3457 (2007). Perhaps recognizing the governor’s lack of power to suspend prescription, the legislature ratified her three executive orders “to prevent injustice, inequity, and undue hardship to persons who were prevented by these hurricanes from timely access to courts and offices in the exercise of their legal rights, including the filing of documents and pleadings as authorized or required by law.” 2005 La. Acts No. 6, § 1 (enacting LA. REV. STAT. ANN. § 9:5821–35 (2006)). The Louisiana Supreme Court issued a resolution on October 3, 2005 recognizing the Governor’s first two executive orders and permitted judges of any Louisiana court to shorten or suspend periods outlined in those orders. While this resolution was recognized by the governor’s third executive order, the legislature’s ratification of the Governor’s executive orders makes no mention of the Louisiana Supreme Court’s resolution.
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expired during the time period of August 26, 2005, through January 3, 2006, shall lapse on January 4, 2006.

B. The provisions of Subsection A shall not apply to any matter concerning the prescription of nonuse applicable to mineral servitudes, mineral royalty interests, and executive rights and shall be governed by the Louisiana Mineral Code and are not subject to the suspension provisions in this Section.\textsuperscript{191}

Louisiana courts have entertained the idea of reviving prescribed actions when there has been legislative action but have declined to do so absent a clear and unequivocal intent by the legislature.\textsuperscript{192} In fact, no Louisiana court has ever revived a prescribed claim based on legislative action. While the period following the 2005 hurricanes was the first time that the Louisiana legislature gave a sufficiently clear and unequivocal expression of intent to revive a prescribed claim, there is no judicial precedent tending towards its validity other than an indication that a court would "at the very least require"\textsuperscript{193} such an expression of legislative intent. Rather, the law in Louisiana is that "the Legislature is without the authority to revive a prescribed claim."\textsuperscript{194} This is so because the right to raise the exception of prescription is a vested right in the defendant, and "even where the legislature has expressed its intent to give a law

\textsuperscript{191} § 9:5822 (emphasis added).
\textsuperscript{192} See Cameron Parish Sch. Bd. v. Acands, Inc., 687 So. 2d 84, 91 (La. 1997) (refusing to revive an already prescribed cause of action absent a clear and unequivocally expressed intent by the legislature); Chance v. Am. Honda Motor Co., Inc. 635 So. 2d 177, 178 (La. 1994) ("[W]e require, at the very least, a clear and unequivocal expression of intent by the legislature for such an 'extreme exercise of legislative power.'" (quoting Hopkins v. Lincoln Trust Co., 135 N.E. 267, 267 (1922))); In re Succession of Faget, 938 So. 2d 1003, 1007 (La. App. 1st Cir. 2006) ("[T]he act does not clearly and unequivocally express an intent to have the act apply retroactively to revive a right. We therefore do not apply it retroactively to revive . . . [the] prescribed claim."); Succession of McKay, 921 So. 2d 1219, 1223 (La. App. 3d Cir. 2006) (refusing to apply a statute retroactively without clear and unequivocal express intent by the legislature to do so).
\textsuperscript{193} Chance, 635 So. 2d at 178.
\textsuperscript{194} See supra note 189.
retroactive effect, that law may not be applied retroactively if it would . . . disturb vested rights.”

The Louisiana Supreme Court recently evaluated the constitutionality of Acts 739 and 802, which extended prescription for insurance claims arising out of damage caused by Hurricanes Katrina and Rita. On July 10, 2006, the Louisiana Attorney General filed suit in the Nineteenth Judicial District Court to seek declaratory judgment on the constitutionality of the Acts. The Louisiana Supreme Court exercised its supervisory jurisdiction over the matter and remanded the case to the Nineteenth Judicial District Court for an expedited hearing. On August 23, 2006, Judge Bates of the Nineteenth Judicial District Court ruled in favor of the State. The Louisiana Attorney General sought review of the case on August 24, 2006; the supreme court heard oral arguments the next day and affirmed the district court ruling.

It is important to note that the insurance legislation did not revive any prescribed claims whereas the blanket legislation under

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198. State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed to Do Bus. in State, 937 So. 2d 313, 317 (La. 2006) (“As a further response to the extraordinary circumstances faced by many Louisiana citizens, the Louisiana Legislature enacted House Bill 1289 and House Bill 1302, now known as Acts 2006, Nos. 739 and 802, which extend the prescriptive period within which citizens may file certain claims under their insurance policies for losses occasioned by Hurricanes Katrina and Rita. Prior to these amendments, Louisiana law held that no insurance contract issued in Louisiana could limit the right of action against an insurer to a period less than twelve months. See La. R.S. 22:629(A)(3).”).
199. Id.
200. Id. at 318.
201. Id.
202. Id. at 327.
Louisiana Revised Statutes section 9:5822 did. Acts 739 and 802 were effective before the anniversary of Hurricane Katrina, and the Louisiana Supreme Court declared them to be constitutional just four days before the anniversary of the storm. Thus, Acts 739 and 802 did not revive any prescribed claims because no claim would have prescribed until after the anniversary of the first storm (Hurricane Katrina). The judgment in favor of the state allowed insurance policyholders an additional year to exercise their vested rights, whereas the defendant-insurance carriers' progressive rights had not yet become vested rights. The court recognized this distinction, noting that "in Chance, this court was faced with legislation which, in effect, revived an already prescribed claim. Here, the legislation at issue has the effect of extending a prescriptive period." The court further noted that "even where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would . . . disturb vested rights."

A Louisiana district court addressed the validity of the legislature's retroactive revival of prescribed claims under section 9:5822 in Carmena v. East Baton Rouge Parish Sheriff's Office. In that case, Judge Timothy Kelley granted the defendants' exception of prescription to the plaintiffs' claim for conversion with prejudice. The defendants relied on the Supreme Court's holding in Elevating Boats and Chance in arguing that the plaintiffs' claim prescribed one year after the date of the claimed incident and could not have been suspended by an unconstitutional executive
order by the Governor or by the legislature’s retroactive revival of a prescribed action.\textsuperscript{210}

The \textit{Carmena} case came before the Louisiana Supreme Court\textsuperscript{211} under the court’s appellate jurisdiction over trial court determinations of constitutionality.\textsuperscript{212} Unfortunately, the trial court \textit{did not make any determination as to constitutionality}.\textsuperscript{213} Thus, the Louisiana Supreme Court properly determined that it had no basis to exercise its appellate jurisdiction and refused to review the case further.\textsuperscript{214}

A handful of Louisiana cases have applied the Governor’s executive orders and their ratification by the legislature to legal deadlines, but no Louisiana case directly addressed the issue of retroactively reviving \textit{prescribed} claims.\textsuperscript{215} There are likely many

\begin{itemize}
\item \textsuperscript{210} Defendant’s Memorandum, \textit{Carmena}, supra note 12, at 6 (citing Elevating Boats, Inc. v. St. Bernard Parish, 795 So. 2d 1153, 1163 (La. 2001), \textit{overruled on other grounds} by Anthony Crane Rental v. Fruge, 859 So. 2d 631 (La. 2003); Chance v. Am. Honda Motor Co., Inc., 635 So. 2d 177, 178 (La. 1994)).
\item \textsuperscript{211} \textit{Carmena} v. E. Baton Rouge Parish Sheriff’s Office, 947 So. 2d 715 (La. 2007).
\item \textsuperscript{212} \textit{LA. CONST.} art. V, § 5(D).
\item \textsuperscript{213} \textit{Carmena}, 947 So. 2d 715.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{See, e.g.,} State v. Schnyder, 937 So. 2d 396, 399 (La. App. 5th Cir. 2006) (considering an appeal, which was otherwise untimely on its face, as timely in light of the Governor’s executive orders); State v. Knowles, No. 06-821, 2006 WL 3804585, at *2 (La. App. 1st Cir. Dec. 28, 2006) (granting defendant’s request for a continuance on the grounds of Katrina-related hardship); Fox Electric, L.L.C. v. Moghimi, 939 So. 2d 604, 605–06 (La. App. 2d Cir. 2006) (allowing a \textit{pro se} plaintiff an “[e]nlargement of [t]ime” because he was unable to reach his attorney and unable to access his files, which had been forwarded to a contact person in New Orleans who was also unreachable). It should be noted that these cases do not address prescription, but rather, extension of legal deadlines. As such, concerns of retroactivity are distinguished. See also Smith v. Avant Garde Homeowners Ass’n, Inc., 945 So. 2d 89, 90–91 (La. App. 5th Cir. 2006), in which the court denied a third party defendant’s peremptory exception of prescription to a third party plaintiff’s demand, filed on November 23, 2005, which was the subject of a claim filed June 14, 2005 for an injury sustained on June 14, 2004, on the basis of the Governor’s executive orders. It is important to note that, while the court “den[ied] the exception of prescription,” the court likely intended to deny the “untimeliness of the legal deadline” for bringing a third party demand. \textit{Id.} at 91. The distinction is an important one, as periods of prescription and peremption are different from legal deadlines. \textit{Id.}
prescribed claims that would have benefited from legislative revival, but the correct ruling of the lower court in *Carmena* and the likelihood that other courts would follow this reasoning renders such retroactive revival impermissible.

**B. Overbreadth in Legislative Suspension of Prescription**

The second major complication in using legislative action to suspend prescription is that it is invariably overbroad. While it is true that the legislature may narrowly tailor its mandate, the judiciary is generally in the best position to review the facts and decide whether one's case is worthy of suspension. Two legislative decrees are at issue: a law prospectively extending suspension against insurance carriers in favor of policyholders suffering damage as a result of Hurricanes Katrina and Rita, and the statewide legislation suspending prescriptive and peremptive periods for claims that either prescribed or were about to prescribe following Hurricanes Katrina and Rita.

1. **Suspension of Prescription Against Insurance Carriers**

Even though the court in *State v. All Property and Casualty Insurance Carriers Authorized and Licensed to Do Business in State* 216 was not pressed to revive a prescribed claim, it did need to address whether statewide legislation suspending prescription in favor of insurance policyholders whose claims arose out of Hurricanes Katrina and Rita was preferable to the exercise of *contra non valentem*. The Attorney General conceded in discussing the applicability of *contra non valentem* that "the situation created by the 2005 hurricane season, as it pertains to the ability of affected individuals to timely file property damage claims, is precisely the type of circumstance that may cause a court to invoke this doctrine." 217 The Attorney General discussed *contra non valentem*

216. 937 So. 2d 313 (La. 2006).

in order to support the policy considerations of the legislature in extending prescription for insurance claims, noting that

> [f]or the same reasons that courts often bring into play the doctrine of *contra non valentem*, the Legislature felt that an essential aspect of the recovery effort from Hurricanes Katrina and Rita included giving to the victims of these storms a reasonable opportunity and timeframe within which to bring claims for property damage under their insurance policies.\(^ {218} \)

Likewise, the defendant-insurance carriers argued that

the Acts at issue were unnecessary as Louisiana law already contains the means for persons prevented from filing suit to avoid dismissal of their claims due to prescription. Specifically, the defendants point out that the doctrine of *contra non valentem* applies to prevent the running of liberative prescription where, in fact and for good cause, a plaintiff is unable to exercise his cause of action when it accrues.\(^ {219} \)

The Louisiana Supreme Court agreed with the Attorney General that legislative action was preferable to the “mass confusion and an increase in filing in our courts” that would result from the case-by-case approach required by *contra non valentem*.\(^ {220} \)

The fact that *contra non valentem* requires a tedious case-by-case analysis is undeniable. The legislature recognized this problem and perhaps related issues, such as inconsistent verdicts, and “addressed this significant public concern in an appropriate manner.”\(^ {221} \) But what must be considered is that this legislation was narrowly tailored to a single class of plaintiffs: insurance policyholders having claims arising out of damage caused by Hurricanes Katrina and Rita. Given the highly regulated nature of the insurance industry and how the statute applied to a narrow class of plaintiffs whose claims arose from substantially similar factual scenarios, it is understandable that the state would veer away from

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218. *All Prop.*, 937 So. 2d at 327 n.13.
219. *Id.*
220. *Id.*
221. *Id.*
contra non valentem to avoid inconsistent verdicts in this particular setting.

2. Statewide Legislation Suspending Prescriptive and Peremptive Periods

The statewide blanket suspension of prescription presents a grossly overbroad legislative mandate. Hurricanes Katrina and Rita may have affected the entire state, but it was clearly more destructive to South Louisiana than to other parts of the state. Just as Troplong cautioned, the mere presence of a statewide crisis such as war cannot, in and of itself, present a condition so deleterious as to warrant the statewide suspension of prescription. The issue becomes whether a case-by-case application of contra non valentem is preferable to the suspension of prescription for the entire state for more than a third of the year.

It is important to clarify that this retroactive modification of prescription did not merely pertain to those days when courthouses were closed as a result of the two hurricanes. Those days for which a clerk of court closed his office were considered legal holidays.

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222. 2 TROPLONG, supra note 73, NO. 728, at 299.
223. LA. REV. STAT. ANN. § 1:55(E)(2) ("If an emergency situation develops which, in the judgment of the clerk of court, renders it hazardous or otherwise unsafe for employees of the office of the clerk to continue in the performance of their official duties or for the general public to conduct business with the clerk's office, the clerk, with prior approval from the clerk's chief judge or other person authorized to exercise his authority, may order the closing of his office for the duration of the hazardous or unsafe condition. No such closure shall be effective nor shall such period of closing be considered a legal holiday unless prior written approval or written confirmation from such chief judge or person acting on his behalf is received by the clerk of court. When the office is reopened, the clerk shall have published as soon as possible a legal notice in all of the official parish journals of the parishes within the district setting forth the dates of closure, the hour of closure if applicable, the reasons for closure, and a statement that, pursuant to R.S. 1:55(E)(3), these days or parts of days were legal holidays. The clerk shall attach a similar statement to every document, petition, or pleading filed in the office of the clerk on the first day or part of a day his office is open after being closed under the provisions of this Paragraph, whenever the petition or document relates to a cause of action, right of appeal, or other matter against which prescription could have run or time periods imposed by law could have expired."). See, e.g., N. Ins. Co. of N.Y. v. Gabus, 877 So. 2d 1183 (La. App. 3d Cir. 2004)
and were not included in the computation of time for purposes of prescription. The consequences of this legislative action are much more significant. For a period of months, claims that were scheduled to have lapsed were given a grace period despite most courts having been open either immediately following the storm or shortly thereafter. While it is true that a number of courts in the most heavily devastated areas of South Louisiana remained closed for a lengthy period of time, most Louisiana courts opened within days or weeks. Many courts never closed. Nevertheless, plaintiffs throughout the entire state whose claims were set to prescribe between August 26th and January 3rd benefited from a suspension of prescription through January 3rd.

In light of the impact of the two hurricanes on the state’s judicial system as a whole, a blanket suspension of prescription was inappropriate. The legislature carved out its decree with an axe when a scalpel was appropriate. It is almost inconceivable that a Shreveport litigant was sufficiently affected by the storm to require a suspension of prescription for more than four months. On the other hand, it is understandable that some New Orleans area litigants continued to be unable to file claims even with the lengthy grace period.

(recognizing that Hurricane Lili forced the Fifteenth Judicial District Court in Lafayette Parish to close for five days and constituted legal holidays).
224. LA. CIV. CODE ANN. art. 3454 (2007) (“In computing a prescriptive period, the day that marks the commencement of prescription is not counted. Prescription accrues upon the expiration of the last day of the prescriptive period, and if that day is a legal holiday, prescription accrues upon the expiration of the next day that is not a legal holiday.”).
225. For example, the Jefferson Parish Clerk of Court closed the courthouse as a result of Hurricane Katrina from August 26, 2005 through the middle of October. Telephone Interview with the Clerk of Court for Jefferson Parish (Sept. 15, 2006).
226. For example, the Rapides Parish Clerk of Court closed the courthouse as a result of Hurricane Rita for a day and a half. Rapides Parish Clerk of Court, Motion for Emergency Closure of Office (Sept. 22, 2005).
227. For example, neither Bossier nor Caddo Parish courts closed. Telephone Interview with the Clerks of Court for Bossier Parish and Caddo Parish (Sept. 15, 2006).
These are precisely the hypothetical situations that jurists like Carbonnier and Martineau believed were merely academic for the purposes of testing out applications of contra non valentem.\textsuperscript{229} Confidence in their legislatures to take affirmative measures to suspend prescription handicapped any further discussion on the issue.\textsuperscript{230}

It is undeniable that the statewide suspension of prescription in the months following Hurricanes Katrina and Rita was an easy solution to a complex problem. Courts were not burdened with deciding whether one litigant's factual impediment to meeting a prescriptive deadline was more worthy of suspension than another's. It is also understandable that a case-by-case approach is vulnerable to inconsistent verdicts. This is the argument of the cynic who fails to recognize the value of the judiciary.

Judges, not legislators, are in the best position to decide whether a litigant's factual impediments to meeting his prescriptive deadline warrants suspension. Perhaps the legislature would address the suspension of prescription for every conceivable cause of action if it could. For example, residents of Bossier Parish would benefit from a one-week suspension of prescription, whereas Jefferson Parish residents would get an additional month to file suit. The legislature could further narrow its declaration by the type of claim—maybe declaring that all conversion suits in Orleans Parish benefit from a three month suspension of prescription, whereas all trespass suits are limited to two months of suspension in St. Bernard Parish.

Greater legislative specificity might yield more equitable results, but we cannot possibly require our legislature to tailor laws

\textsuperscript{229} CARBONNIER, supra note 27, at 171; MARTINEAU, supra note 71, NO. 216, at 218–19.

\textsuperscript{230} CARBONNIER, supra note 27, at 171; MARTINEAU, supra note 71, NO. 216, at 218–19 (“En France, des lois spéciales ont été adoptées pour suspendre les prescriptions durant les guerres de 1914–1918 et de 1939–1945. Le législateur québécois agirait sans doute de même dans une situation identique; la question de déterminer si la guerre et l'invasion constituent des cas d'impossibilité d'agir prendrait alors un caractère académique.” (“In France, the special laws were adopted in order to suspend prescription during the wars of 1914–1918 and of 1939–1945. The Québécois legislature would react, without doubt, in the same way in an identical situation; the question to determine if the war and the invasion constitute cases of impossibility to act would be academic in character.”) (author's translation)).
suspending prescription for every conceivable scenario. Such is the function of the judiciary: to address these specific types of issues on a case-by-case basis. As ex ante planners, the legislature cannot possibly address fact-intensive cases like the judiciary can. To say that the application of contra non valentem would create "mass confusion and an increase in filings in our courts" insofar as it applies to any and all claims is to deny the function of our courts. Judicial efficiency is undoubtedly valuable; however, we must be careful not to fold to it without giving due consideration to equity.

V. RECOMMENDATIONS

Because of the complexities raised by legislative retroactivity and overbreadth—and in light of the approaches and experiences of foreign civil and common law jurisdictions—the Louisiana approach to contra non valentem must be revisited and revived in cases where there is a factual impediment to prescription.

Some jurisdictions, such as New York, have well-conceived bodies of law in their arsenal in the event of a crisis, but these laws work only insofar as there is affirmative legislative or executive action immediately following the crisis. Legislative or executive suspension of prescription is problematic because the legislature has only a narrow window within which to suspend prescription before its action is either impermissibly retroactive or neglects claims that prescribed during or after the emergency event. Additionally, the constraints of ex ante planning give some litigants a windfall while the plight of other litigants is not sufficiently redressed.

The issue giving rise to the suspension invariably affects different litigants in different ways. Judges are in the best position to evaluate cases in the most equitable way, and the doctrine of contra non valentem makes this possible. Jurisdictions recognizing contra non valentem strictly interpret what constitutes a factual impediment, which is warranted considering the value of prescription and the significance of being able to know when an action ceases to exist.

A model approach to contra non valentem, insofar as it concerns factual impediments, should:

(1) deviate minimally from the applicable prescriptive period;
(2) allow the judge to equitably evaluate the merits of the factual impediment in a way that is neither indiscriminate nor overly restrictive;
(3) provide as much certainty as possible in determining the cessation of the suspension of prescription; and
(4) clarify that the suspension of prescription applies only for those actions that would have prescribed during the existence of the factual impediment or shortly after the removal of the factual impediment.

For these reasons, I recommend that Louisiana law recognize the following:

When a factual impossibility prevents a person entitled to exercise an action from exercising his right, the action shall not prescribe until one week from the day the impediment ceases to exist. This suspension of prescription shall apply equally to peremption notwithstanding Louisiana Civil Code article 3461. This section shall apply to all modes of prescription, including liberative, acquisitive, and non-use.

This proposed article affords the person entitled to an action with the ability to exercise his right when an impossibility to act in fact would otherwise cause the right to prescribe. It deviates minimally from the applicable prescriptive period by affording merely the suspension of prescription for actions that were set to prescribe during the existence of the factual impediment or shortly thereafter. It is important that the article afford a period of time for the owner of the action to exercise his right after the cessation of the impediment for two reasons: (1) it provides the owner of the action with an equitable and reasonable period of time to return to the action after the hiatus; and (2) it helps to reassert certainty in the prescriptive period after the cessation of an uncertain suspension.

The one-week extension admittedly introduces an ex ante component that much of this Comment has argued against, but it is important to note that the one-week extension is not triggered until the cessation of the factual impediment. The duration of a factual
impediment may be longer for some litigants than others. For example, the factual impediment for the solidly upper-middle class lawyer from New Orleans who evacuated to Baton Rouge during Hurricane Katrina would have ceased to exist when the Orleans parish courts reopened and he was able to return home. The duration of the impediment would be much longer for the impoverished resident of New Orleans’ Lower Ninth Ward who was airlifted from his roof to a Red Cross shelter. Because he has been working a minimum wage job seven states away in order to afford a ticket home, his factual impediment would continue to suspend prescription. At some point, the impediment ceases to exist, and the litigant can revisit his case. The additional week after the cessation of the impediment allows the litigant a reasonable amount of time to revisit the case instead of having to march to the courthouse on the day that everything returns to normal.

The uncertainty of how to address the issue of prescription in the weeks and months following Hurricanes Katrina and Rita illustrates the need for clarity in the law. Jurists such as Carbonnier and Martineau were too quick to discount hypothetical applications of contra non valentem when a factual impossibility to act suspended prescription. Instead, we must be reminded of the most fundamental application of contra non valentem as Irenius proposed: “praescription non currit in his qui se velint agere non possunt” (“prescription does not run in the case of those who find themselves unable to act”). Should Louisiana face another crisis like those following Hurricanes Katrina and Rita, courts should revisit the doctrine that has been polished with antiquity throughout the civil law world: contra non valentem agere non currit praescriptio (“prescription does not run against one who is unable to act”).

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