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Compensation for Nonpecuniary Loss: Revising Louisiana Civil Code Article 1998 to Reflect Litvinoff's Damage-Based Approach

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INTRODUCTION

Imagine a collector of fine wines. He acquired this hobby from his father, who also collected wines and passed down his collection to his son upon his death. The collection has now amassed a significant monetary value. One day, the wine owner contracted with a company to make adjustments to the thermostat in his wine cellar. An error on the part of a company employee raised the temperature in the cellar too high, causing all of the wine to spoil. Louisiana law is clear that the wine owner can recover damages for the loss of the wine's value in a breach of contract action.[1] But the wine owner sustained another loss that day—the loss of a collection that he enjoyed and shared with his deceased father. The collection of wine, although having a significant monetary value, also had a significant "nonpecuniary" value.[2] Under the current state of Louisiana law on obligations, the wine owner would have difficulty convincing a court that nonpecuniary damages are appropriate under Louisiana Civil Code article 1998 and would likely receive no compensation for the nonpecuniary loss that he suffered.[3]

Actions for breach of contract most commonly involve injuries easily and appropriately susceptible of pecuniary or monetary valuation.[4] Sometimes though, the loss felt by the obligee is not an exclusively financial injury, such as the loss felt by the wine owner as a result of his emotional attachment to his wine collection. When "the impairment affects an interest beyond the scope of the

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1. *See* LA. CIV. CODE art. 1995 (2015) ("Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.").

2. "Nonpecuniary harm then should be taken to refer to such damages or injury that cannot, strictly speaking, be measured in monetary terms." Louisiana State Law Institute, Supplemental Memorandum on Damages for Nonpecuniary Losses at 2, Prepared for Meeting of the Obligations Revision Committee (July 25, 1980) (on file with the Louisiana State Law Institute) [hereinafter Supplemental Memorandum on Damages for Nonpecuniary Losses].

3. SAÚL LITVINOFF, OBLIGATIONS § 6.7, *in* 6 LOUISIANA CIVIL LAW TREATISE 163 (2d ed. 1999) (contrasting the general acceptance of nonpecuniary damages in delictual actions with those in contractual actions). *See also* LA. CIV. CODE art. 1998 (2015).

4. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 1.

obligee's patrimony . . . the damage is of a moral nature."[5] When an obligee suffers such an injury, it can be repaired by nonpecuniary damages.[6] Damages of this type frequently include those for mental anguish, embarrassment, inconvenience, humiliation,[7] and loss of consortium.[8] Other types of nonpecuniary damages that are sought less often include "other encroachments upon the personality such as emotional distress, loss of amenities of life, injury to honor or diminution of a person's reputation."[9]

Former Louisiana Civil Code article 1934 governed nonpecuniary damages and was interpreted inconsistently by Louisiana courts, leading to confusion for litigants, practitioners, and judges. After a significant period of unpredictability in both the lower courts and the Louisiana Supreme Court, as well as critical commentary in the state law reviews, the Obligations Committee of the Louisiana State Law Institute discussed changes to article 1934.[10] Led by Professor Saúl Litvinoff, the Committee recommended to the Legislature a revision of article 1934 with the intention of providing clarity to this obscure area of the law.[11] The Louisiana Legislature adopted article 1998, effective January 1, 1985.[12] Mainly, the Committee dealt with when and to what extent compensation for nonpecuniary loss should be permitted.[13]

Now, the Louisiana Civil Code permits recovery of nonpecuniary damages for the breach of conventional obligations under article 1998.[14] However, the Louisiana Supreme Court has held that such

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5. Saúl Litvinoff, *Moral Damages*, 38 LA. L. REV. 1, 2 (1977) [hereinafter Litvinoff, *Moral Damages*]. After recognizing that there are interests worth protecting beyond the financial realm, French writers developed a concept known as "moral patrimony." *See* LITVINOFF, *supra* note 3, § 6.4, at 159. Litvinoff described one's moral patrimony as a compilation of "intangible assets such as honor, reputation, feelings, and peace of mind." *Id.*

6. Litvinoff, *Moral Damages*, *supra* note 5, at 1.

7. Gary P. Graphia, Comment, *Nonpecuniary Damages: A Guide to Damage Awards Under Louisiana Civil Code Article 1998*, 50 LA. L. REV. 797, 797–98 (1990).

8. LITVINOFF, *supra* note 3, § 6.1, at 157.

9. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 2. *See also* LA. CIV. CODE art. 1998 cmt. e (2015) (excluding damages for "mere worry or vexation").

10. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 1.

11. *See* discussion *infra* Part II.

12. Act No. 331, 1984 La. Acts 156 ("To amend and reenact Titles III and IV of Book III of the Civil Code, to comprise Articles 1756 through 2057 . . . .").

13. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 1.

14. LA. CIV. CODE art. 1998 (2015). Former article 1934 was repealed in 1985. *See* Act No. 331, 1984 La. Acts 156.

damages are only available in limited circumstances—where the nonpecuniary elements of a contract are "significant."[15] Although nonpecuniary damages are rarely awarded in breach of contract actions, it is unquestionable that nonpecuniary, or non-patrimonial interests, can be injured by an obligor's nonperformance of an obligation.[16] As a result of the Louisiana Supreme Court's limited grant of nonpecuniary damages, some obligees are left with uncompensated nonpecuniary injuries.[17] This Comment considers whether the 1985 revision that resulted in article 1998 successfully clarified the availability of nonpecuniary damages for the breach of conventional obligations and offers suggestions to better serve litigants seeking damages for nonpecuniary loss.

Part I of this Comment discusses former Louisiana Civil Code article 1934, the legislation that governed the availability of nonpecuniary damages in Louisiana, and the effect it had on Louisiana jurisprudence. Part II analyzes the 1985 revision of article 1934, first discussing the drafters' attempt to clarify the state of the law surrounding nonpecuniary damages, then highlighting the post-revision ambiguities. Part III evaluates why the restrictive interpretation given to current article 1998 by Louisiana courts has hindered its availability to serve litigants and is inconsistent with the original intent of the Obligations Committee. Finally, Part IV offers a model article that attempts to remedy the conflicting jurisprudence and legislation in Louisiana and to finally give Louisiana courts and practitioners guidance on the availability of nonpecuniary damages for the breach of conventional obligations.

I. ARTICLE 1934 OF THE 1870 CIVIL CODE: PRE-REVISION NONPECUNIARY DAMAGES IN LOUISIANA

Generally, damages in contract are measured by what the parties contemplated during the formation of the obligation, usually the loss sustained, including the profits deprived by the

15. *See, e.g.*, Young v. Ford Motor Co., 595 So. 2d 1123 (La. 1992); Lafleur v. John Deere Co., 491 So. 2d 624 (La. 1986); Meador v. Toyota of Jefferson, 332 So. 2d 433 (La. 1976).

16. Litvinoff, *Moral Damages*, *supra* note 5, at 1.

17. The focus of this Comment is on a litigant's ability to recover damages in contractual actions. It is not intended to provide guidance on damage recovery in delictual actions, which may or may not be available depending on the circumstances of the claim. For a discussion of the delictual equivalent of nonpecuniary damages, see WILLIAM CRAWFORD, TORT LAW §§ 28.1–28.5, *in* 12 LOUISIANA CIVIL LAW TREATISE (2d ed. 1999).

obligee.[18] Contrast damages in contract, which are based on foreseeability and the parties' intentions, with those in tort, which are meant to compensate and make the victim whole again.[19] Whether this distinction has merit remains questionable because "any interest worthy of protection, even if not of a patrimonial nature, may be the object of an obligation."[20] The vast majority of contracts involve pecuniary interests, but others have mixed interests—both pecuniary and nonpecuniary.[21] Seldom will a contract involve an exclusively nonpecuniary interest.[22] However, "the fact that damage of an exclusively moral nature occurs only seldom is no justification for a denial of recovery where such damage has been proved."[23] Louisiana's interest in fully compensating an obligee has wavered in the past, and whether that interest exists now is the subject of this Comment.

Whereas Louisiana repairs nonpecuniary losses with nonpecuniary damages, the French repair these injuries with *dommage moral*.[24] The term *dommage moral* is more accurate than the Louisiana label because it acknowledges that, although the damage is repaired in money, the *loss* felt is nonpecuniary or "moral."[25] This term may be more appropriate because the availability of nonpecuniary damages hinges on a distinction based on the nature of the injured right as well as the actual damage suffered.[26] If the nonperformance of an obligation results in nonpecuniary or nonpatrimonial harm, nonpecuniary damages should be available, although that has not always been the case.[27] In contrast, when the nonperformance of an obligation causes damage to a right that is patrimonial in nature, nonpecuniary damages are not available, but

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18. *See* LA. CIV. CODE art. 1995 (2015); *see also* LA. CIV. CODE arts. 1996–1997 (2015) (governing relationship of damages to obligors in good or bad faith).

19. SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 64:12 (4th ed.).

20. Litvinoff, *Moral Damages*, *supra* note 5, at 2.

21. LITVINOFF, *supra* note 3, § 6.7, at 164.

22. Litvinoff, *Moral Damages*, *supra* note 5, at 3.

23. *Id.*

24. LITVINOFF, *supra* note 3, § 6.1, at 155–57. *See also* Litvinoff, *Moral Damages*, *supra* note 5, at 1.

25. LITVINOFF, *supra* note 3, § 6.1, at 155. Additionally, moral losses are those which "are not able to be appreciated in money, i.e., not capable of a precise monetary calculation." Agustín Parise, *Non-Pecuniary Damages in the Louisiana Civil Code Article 1928* (May 18, 2006) (unpublished LL.M. Paper, Paul M. Hebert Law Center) (on file with Paul M. Hebert Law Library, Paul M. Hebert Law Center).

26. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 1.

27. *Id. See, e.g.*, Bowes v. Fox-Stanley Photo Prods., Inc., 279 So. 2d 844 (La. Ct. App. 1980).

general compensatory damages are.[28] Although both injuries are compensated in money, the availability of nonpecuniary damages depends on what type of right was actually injured by the obligor's failure to perform properly.[29]

A. Background on Former Louisiana Civil Code Article 1934

Until 1985, Louisiana Civil Code article 1934 governed the availability of nonpecuniary damages for the breach of conventional obligations in Louisiana.[30] Article 1934(3) provided:

> Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. *Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach: a contract for a religious or charitable foundation, a promise of marriage, or an engagement for the work of some of the fine arts, are objects and examples of this rule*.[31]

The italicized portion made its debut in the Louisiana Civil Code in 1825 as article 1928 but was later renumbered to article 1934 in 1870.[32] Unlike many of Louisiana's other articles, article 1928 was not based on an article that existed in the French *Code Civil*.[33] Perhaps article 1928 attempted to codify what was merely jurisprudential and doctrinal in the French system.[34] Louisiana's article was written in both French and English, but the translation into English gave rise to questions regarding its accuracy.[35] Professor Litvinoff believed that the English translation was not

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28. *See generally* LA. CIV. CODE arts. 1994–2004 (2015).

29. The confusion created by calling damages for nonpecuniary loss "nonpecuniary damages" troubled Professor Litvinoff, which led him to advocate for the use of the term "moral damages." *See* Litvinoff, *Moral Damages*, *supra* note 5, at 1.

30. LA. CIV. CODE art. 1934 (repealed 1985).

31. *Id.* (emphasis added).

32. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 436 (La. 1976).

33. *Id.*

34. Parise, *supra* note 25, at 49. One scholar traces article 1928 back to the doctrinal writings and interpretations of Toullier and Domat, two early commentators of the French *Code Civil*. *Id.*

35. Litvinoff, *Moral Damages*, *supra* note 5, at 7.

accurate, because the French version "offer[ed] a wider scope and a greater generality than [was] reflected in the official English version."[36] Despite the translation discrepancy, Louisiana courts strictly interpreted article 1934 in an attempt to accord with the original French version.[37] Because the English version was the law, litigants used article 1934 unpredictably as a tool to recover nonpecuniary damages with varying degrees of success.

B. The Louisiana Supreme Court's Interpretation of Article 1934(3)

The Louisiana Supreme Court heavily analyzed article 1934(3) in its 1976 decision of *Meador v. Toyota of Jefferson, Inc.*[38] In *Meador*, the 18-year-old plaintiff sought nonpecuniary damages from the defendant, Toyota of Jefferson, for a long delay in repairing her first car.[39] Based on its interpretation of article 1934, the trial court awarded the plaintiff $700 for "aggravation, distress, and inconvenience" due to the defendant's "breach of the implied obligation to repair within a reasonable time."[40] The Fourth Circuit Court of Appeal reversed the damage award, and the plaintiff appealed to the Louisiana Supreme Court.[41]

The Louisiana Supreme Court granted writs to consider whether nonpecuniary damages were appropriate.[42] The plaintiff in *Meador* made a textual argument using the disjunctive "or" in article 1934 and asserted that the inclusion of "or" meant that "some convenience" *or* "intellectual gratification" were grounds for recovery of damages under article 1934.[43] This distinction between physical versus intellectual gratification has produced fractured

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36. *Id.* at 8. *See infra* text accompanying note 62.

37. For a source analysis of article 1934, see *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 433, 436 (La. 1976) ("We find the French source provision of 1934(3) in the 1825 Civil Code, if not controlling, at least persuasive in our present interpretation of the article's ambiguous counterpart in our 1870 Civil Code.").

38. *Id.* at 433. *See supra* text accompanying note 31 (reproducing former article 1934(3) in full).

39. *Meador*, 332 So. 2d at 434.

40. *Id.*

41. Meador v. Toyota of Jefferson, Inc., 322 So. 2d 802 (La. Ct. App. 1975).

42. *Meador*, 332 So. 2d at 433.

43. *Id.* Before the revision, the Civil Code and the interpreting jurisprudence often used the word "intellectual" to describe what the current Code usually calls "nonpecuniary." *See* Louisiana State Law Institute, Document Prepared for Meeting of the Obligations Committee at 6 (July 27, 1979) (on file with Louisiana State Law Institute) [hereinafter Louisiana State Law Institute, July 27, 1979].

views in Louisiana's lower courts, which the Supreme Court candidly admitted.[44]

The defendants advocated for the strict view of nonpecuniary damage awards, which permitted such damages when the object was exclusively intellectual.[45] Although the Court stated that it "has never adopted a strict view, but has reached results favoring the broader interpretation of Art. 1934(3),"[46] some dicta from the *Meador* opinion suggests otherwise.[47] As proof of the Court's allowance of nonpecuniary damages in cases where there were both physical and intellectual objects, the Louisiana Supreme Court cited cases from as far back as 1903, 1906, and 1939.[48] After examining the French and English text of article 1928 of the Louisiana Civil Code of 1825, the Court concluded that the original drafters did not contemplate physical gratification and that the disjunctive "or" should not be read to allow for convenience[49]

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44. *Meador*, 332 So. 2d at 435. The Court discussed the several different approaches that courts have taken in interpreting article 1934, such as the liberal position and a broader position. *See infra* note 46.

45. *Meador*, 332 So. 2d at 433.

46. *Id*. The broader view the Court is referring to allows recovery "where the object or objects of the contract include elements of intellectual and physical gratification." *Id*. The Court gave the example of *Lewis v. Holmes*, 34 So. 66 (La. 1903), in which the Court allowed recovery of nonpecuniary damages where the plaintiff never received four dresses for her wedding trousseau. *See Meador*, 332 So. 2d at 433. The contract had features that were "both physical (her need for comfortable clothing), and intellectual (her preference for style, or 'taste' and concern with her appearance on her wedding day and on her honeymoon)." *Id.* at 436.

47. *Meador*, 332 So. 2d at 435. The Court later stated that "[w]here an object, or the exclusive object, of a contract, is physical gratification, (or anything other than intellectual gratification) nonpecuniary damages as a consequence of nonfulfillment of that object are not recoverable." *Id.* at 437. By saying "where an object . . . of a contract[] is physical gratification," nonpecuniary damages are not available, the Court is essentially prohibiting recovery of nonpecuniary damages in any case where there is any degree of physical gratification. The contract that has no degree of physical gratification will likely never exist or occur rarely. Later, the Court says that if a principal object is intellectual enjoyment, then damages are recoverable, which seems to imply that there is room for a lesser object. *Id.* Whether the Court believes multiple objects are possible has been the source of significant confusion.

48. *Id.* at 435–36. *See supra* note 46 (discussing *Lewis*). The Court also cited *O'Meallie v. Moreau*, 41 So. 243 (La. 1906), and *Jiles v. Venus Community Center Benevolent Mutual Aid Ass'n*, 186 So. 342 (La. 1939). In both of these cases, the Court awarded damages for nonpecuniary loss in breach of contract actions. The Court distinguished the analysis in these opinions from that in *Meador* because never before had they "historically viewed the source of Article 1934(3) and the origin thereof." *Meador*, 332 So. 2d at 436.

49. *See generally* Steve M. Marks, Note, *Nonpecuniary Damages in Breach of Contract: Louisiana Civil Code Article 1934*, 37 LA. L. REV. 625 (1977)

or physical gratification recovery.[50] This analysis led the Court to hold that under former article 1934, the object of the contract must be either exclusively or principally intellectual to support an award of nonpecuniary damages.[51] This result has been the subject of criticism; as one scholar stated, "the court drew a distinction between intellectual and physical gratification that is not" supported by the terms and history of the article.[52]

Justice Dixon's dissent in *Meador* addressed the tension in refusing to award damages for aggravation and distress where they have been proven simply because the litigation arose out of a contract action.[53] He stated:

> In a society as dependent on the automobile as ours, where a car is not only a convenience but often a necessity, a plaintiff should be able to recover damages representing the aggravation, distress and inconvenience suffered when the repairman breaches his duty to fix the car within a reasonable time.[54]

Justice Dixon framed his dissent from a fairness perspective, and unlike the majority, put no weight on the significance of the plaintiff's intellectual interest and how that interest influenced the contract.[55]

Following *Meador*, Professor Litvinoff questioned the "multiple object" argument posed by the Court.[56] Specifically, Professor Litvinoff questioned whether article 1934 only covered obligations with exclusively intellectual objects or whether it also

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(discussing the different interpretations of the word "convenience" as used in article 1934 and how those interpretations affect the nonpecuniary damage analysis).

50. *Meador*, 332 So. 2d at 437. The Court equated the term "convenience" used in article 1934(3) with physical gratification. In *Jack v. Henry*, 128 So. 2d 62, 72 (La. Ct. App. 1961), the Louisiana First Circuit used the "convenience rationale" to award damages to a homeowner who suffered inconvenience resulting from a contractor's breach of the obligation. The Court does not acknowledge that the First Circuit also discussed some intellectual benefits derived from the construction of this custom home, such as a place to provide for his family and "for the express purpose of fulfilling defendant's individual conception of a home." *Id.*

51. *Meador*, 332 So. 2d at 437.

52. Kathryn Bloomfield, Comment, *Recovering Nonpecuniary Damages for Breach of Contract Under Louisiana Law*, 47 LA. L. REV. 541, 541 (1987).

53. *Meador*, 332 So. 2d at 438 (Dixon, J., dissenting).

54. *Id.*

55. *Compare id.* at 437 (majority opinion), *with id.* at 438–39 (Dixon, J., dissenting).

56. *See* Litvinoff, *Moral Damages*, *supra* note 5, at 10.

covered obligations that were made for multiple objects, some intellectual and some pecuniary.[57] Professor Litvinoff gave as an example a contract for a spacious home, which in addition to being a smart investment, also provides intellectual enjoyment by offering comfort and security to the family who owns the home.[58]

Professor Litvinoff suggested two principal reasons why article 1934 should be broadly interpreted.[59] First, the article simply did not include a requirement that the intellectual interest be significant or exclusive, and to read such a requirement into the text would be an inappropriate alteration.[60] Additionally, Professor Litvinoff argued that the English version of article 1934(3) "contains quite a few departures from the French original"—differences that truly affect the article's meaning.[61] He believed that article 1934 should have been translated as follows:

> When a contract was made for the purpose of securing to a party a *purely* intellectual enjoyment, such as that related to religion, morality, taste, *personal comfort or any other kind of satisfaction of that order*, though such things were not evaluated in money by the parties, damages are nevertheless due for breach of the obligation. A contract the purpose of which is a religious or charitable foundation, a promise of marriage, or the undertaking to do a work in any of the fine arts, *is an example of a case where this rule can be applied*.[62]

Professor Litvinoff argued that the drafters' failure to include "exclusive" before the word "purely" in his translation of article 1934 rendered such an interpretation contrary to the text, purpose, and history of the article.[63] Litvinoff contended that the examples mentioned at the end of former article 1934 were merely illustrative of contracts that may have warranted application of article 1934.[64] The fact that almost all of these examples contain exclusively intellectual interests is not dispositive of whether the drafters' intention was to incorporate an exclusivity requirement.[65]

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57. *See id.*
58. *Id.*
59. *Id.* at 11.
60. *Id.*
61. *Id.* at 7.
62. *Id.* at 7–8 (changes depicted in italics). *But see* Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 437 (La. 1976) (supporting a slightly different English translation).
63. *See* Litvinoff, *Moral Damages*, *supra* note 5, at 11.
64. *Id.*
65. *Id.*

The second reason nonpecuniary damages should be generally available, suggested Professor Litvinoff, is that an interpretation that limits the scope of the article would leave obligees' injured interests unprotected in a variety of situations.[66] Fairness requires reparation for injury sustained above financial loss.[67] Professor Litvinoff used as an example a traveler who contracts to cross the Atlantic Ocean for business reasons and chooses to do so by purchasing a ticket in first class on a cruise ship.[68] If the ship is unable to seat the passenger and forces him to ride in steerage, should he not, in the interest of fairness, be allowed to recover more than just the difference in ticket value?[69] Under the *Meador* approach, a court would likely deny such recovery because the traveler's search for enjoyment, by indulging in the comfort of first class, was not a "principal object of [his] contract" to cross the ocean.[70] Like the traveler example, courts based their arguments for denying nonpecuniary damages under former article 1934(3) largely on this distinction between whether the nonpecuniary object was principal or incidental, despite the absence of such language from the text of the article. This is a further illustration of the Louisiana Supreme Court's unwillingness to interpret the article in accordance with its plain text. The Court's limited interpretation of former article 1934 in *Meador* and the legal commentary that followed heightened the need for a revision of the law on nonpecuniary damages.

II. A LONG TIME COMING: THE 1985 OBLIGATIONS REVISION AND CURRENT ARTICLE 1998

Realizing the need for clarity in the law surrounding nonpecuniary damages, the Louisiana Legislature adopted the recommendations of the Louisiana State Law Institute[71] to replace

66. *Id.*

67. *See id.* at 11–12.

68. *Id.* In this example, the traveler is fulfilling multiple needs—specifically his need for transportation, a traditionally economic interest, as well as "indulg[ing] in the comfort" of riding in first class. *Id.* at 11.

69. *Id.* at 11–12.

70. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 437 (La. 1976).

71. The Louisiana Legislature designated the Louisiana State Law Institute as "an official, advisory law revision commission, law reform agency and legal research agency of the State of Louisiana." John F. Tucker, President, Louisiana State Law Institute, Remarks at the First Meeting of the Louisiana State Law Institute (Mar. 16, 1940), *available at* www.lsli.org/purpose, archived at http://perma.cc/26JE-35JP. The declared purpose of the Law Institute is "to promote and encourage the clarification and simplification of the law of Louisiana and its

former article 1934(3) with current article 1998, which became effective January 1, 1985.[72] Article 1998 now states:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.
>
> Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.[73]

The new article essentially provides two "doors" through which litigants can recover nonpecuniary damages. The second paragraph of the article provides for the recovery of nonpecuniary damages, regardless of the nature of the contract, when the obligor intended to aggrieve the feelings of the obligee through his failure to perform.[74] However, this provision has been largely dormant in practice.[75]

The first paragraph, on the other hand, creates two requirements for the recovery of nonpecuniary damages in breach of contract actions, both of which are modified by the clause "when the contract, because of its nature."[76] The two requirements imposed by the first paragraph of article 1998 are that (1) the contract be "intended to gratify a nonpecuniary interest" due to its nature; and that (2) the obligor knew or should have known from the circumstances surrounding the formation or breach of the contract that the obligee would suffer a nonpecuniary loss.[77]

These two paragraphs create quite a contrast—one based on the nature of the contract and the other awarding damages regardless of the nature of the contract.[78] The inclusion of the "nature inquiry" is likely evidence of the Louisiana State Law Institute's

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better adaptation to present social needs; to secure the better administration of justice and to carry on scholarly legal research and scientific legal work." *Id.*

72. Act No. 331, 1984 La. Acts 718, 869.

73. LA. CIV. CODE art. 1998 (2015).

74. This Comment addresses the paragraphs in reverse order from how they appear in article 1998 because the second paragraph is rarely referenced or used. For further discussion of this aspect of article 1998, see *infra* Part IV.A.5.

75. *See infra* Part IV.A.5.

76. *See* LA. CIV. CODE art. 1998 (2015).

77. *Id.*

78. *See id.*

intent to limit nonpecuniary damages to contracts of a specific type—those that reasonable persons would agree contemplate nonpecuniary or moral interests.[79] However, courts often do not deny nonpecuniary damages based on the nature of the contract. Instead, courts tend to deny damages based on the significance of the interests, which has been the source of confusion due to article 1998's silence on this issue.[80]

The total absence of any discussion in article 1998 involving the degree of significance that the nonpecuniary object of the contract must carry is startling after *Meador*, given that the Court's analysis largely depended on this question.[81] Instead, article 1998 speaks in terms of contracts that are intended to gratify *a* nonpecuniary interest, which means the contract may satisfy other interests simultaneously.[82] The failure to include the terms "significant" or "principal" as modifiers could indicate that the new article does not embrace the standard articulated under *Meador*.[83]

There is further support for the proposition that the Revision Committee intended to overrule *Meador* by replacing "gratification of some intellectual enjoyment" in former article 1934 with the phrase "intended to gratify a nonpecuniary interest" in revised article 1998.[84] The elimination of the designation "intellectual" highlights a more accurate reality about Louisiana obligations—they often encompass nonpecuniary characteristics even where the contract was entered to gratify physical, pecuniary interests.[85] In fact, comment (a) to article 1998 states: "This article is new. It changes the law in part."[86] Unfortunately, it is uncertain how

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79. The propriety of basing the availability of nonpecuniary damages on the nature of contracts is questionable and discussed *infra* Part III.

80. *See, e.g.*, Young v. Ford Motor Co. Inc., 595 So. 2d 1123 (La. 1992); Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433 (La. 1976).

81. *See Meador*, 332 So. 2d 433. Surprisingly, revised article 1998 does not reference an "object" of a contract at all. *See* Graphia, *supra* note 7, at 801 (comparing the texts of the two articles and noting that "an award of nonpecuniary damages should no longer be restricted to cases . . . where the principal or exclusive object is the gratification of a nonpecuniary interest").

82. *See* LA. CIV. CODE art. 1998 cmt. c (2015) (discussing illustrations of nonpecuniary interests).

83. *See* Graphia, *supra* note 7, at 801–02.

84. *Id.* at 801.

85. *Id.* at 802.

86. LA. CIV. CODE art. 1998 cmt. a (2015). The comment states in its entirety:

> This article is new. It changes the law in part. As interpreted in Meador v. Toyota of Jefferson, Inc., 332 So.2d 433 (La.1976), C.C. Art. 1934(3) (1870) allows recovery of damages for nonpecuniary losses only for breach of a contract which has "intellectual enjoyment" as its principal or

article 1998 changes the law, as the pre-revision law under former article 1934 and *Meador* provided little guidance on the availability of damages for nonpecuniary loss. Additionally, comment (a) outlines the departure from *Meador* by pointing to textual differences between revised article 1998 and the interpretation given to former article 1934(3) in *Meador*—specifically the elimination of the requirement that "intellectual enjoyment" be the principal or exclusive purpose.[87] Despite the comments to article 1998, the Louisiana Supreme Court, in subsequent cases, has continued to affirm *Meador* and its proposition that a significant nonpecuniary interest is required to recover damages for nonpecuniary loss in Louisiana breach of contract actions.[88]

A. The Louisiana Supreme Court's Response to Revised Article 1998

Following the revision, a plain text reading of article 1998 coupled with comment (a) signaled that courts might allow nonpecuniary damages in breach of contract actions with greater frequency. However, two seminal cases decided by the Louisiana Supreme Court in the years that followed proved that would not be the case.

1. Lafleur v. John Deere Co.[89]

In 1986, the Louisiana Supreme Court first analyzed article 1998 in *Lafleur v. John Deere Co.*[90] In *Lafleur*, the plaintiffs were farmers who used a John Deere grain drill in the planting of their soybean crop.[91] A "main selling feature" of the grain drill was its

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> exclusive purpose. Under this Article, such damages are recoverable when a contract has been made for the gratification of a nonpecuniary interest and, because of circumstances surrounding its formation or breach, the obligor knew or should have known that his failure to perform would cause nonpecuniary loss. Such damages are also recoverable when regardless of the nature of the contract or the purpose for which it has been made, the obligor, through his breach, intends to aggrieve or hurt the feelings of the obligee.

Id.

87. *Id.*

88. *See, e.g.*, Young v. Ford Motor Co., Inc., 595 So. 2d 1123 (La. 1992).

89. Lafleur v. John Deere Co., 491 So. 2d 624 (La. 1986).

90. *Id.*

91. *Id.* at 626. *Lafleur* had delictual elements not discussed in this Comment because the Court decided the damages issue independent of the legal theory on which the plaintiff's claim was based. Graphia, *supra* note 7, at 800–01.

ability to plant crops at a uniform, pre-set depth.[92] There was a malfunction in the grain drill that prevented seeds from planting at the desired depth, resulting in decreased crop return.[93] The farmers sued separately, and each was awarded nonpecuniary damages.[94]

On review, the Louisiana Supreme Court addressed whether nonpecuniary damages were appropriate.[95] The Court used *Lafleur* as an opportunity to discuss the law post-*Meador* and post-revision. However, this discussion was unnecessary because the facts arose before the revision of article 1934—meaning *Meador* applied.[96] The Court insisted that *Meador* survived the revision, stating:

> [Respondents] contend, and the court of appeal stated, that "the *Meador* rule is no longer inflexibly applied to preclude awards of nonpecuniary damages" in breach of contract cases. This position is not well taken. In fact no opinion of this court after *Meador* has repudiated its holding, despite criticism by some Law Review commentators.[97]

The Court later called the revision a "minor language change" that merely incorporated the *Meador* approach into former article 1934(3), notwithstanding the new article and commentary clearly stating the contrary.[98] The *Lafleur* Court found that the phrase from former article 1934—"for its object the gratification of some intellectual enjoyment"—meant the same thing as the new language "to gratify a nonpecuniary interest."[99] The Court stated that the addition of the phrase "because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss" hardly added anything to the new article because this requirement was implicit in former article 1934.[100] The Court, in an unnecessary analysis of post-revision law, concluded that the Legislature's failure to adopt Professor

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92. *Lafleur*, 491 So. 2d at 626.

93. *Id.* at 627. The crop was about 20 bushels less per acre than the parish average. *Id.* at 627–28.

94. Fontenot was awarded $125,000.00 for mental anguish, and Lafleur was awarded $10,000.00 for mental anguish, aggravation, stress, and inconvenience. *Id.* at 625. The Court of Appeal affirmed. *Id.* at 625–26.

95. *Id.* at 628.

96. *Id.* at 628–30. The facts of *Lafleur* arose in 1980. *Id.* at 630.

97. *Id.* at 628 (quoting Fontenot v. F. Hollier & Sons, 478 So. 2d 1379, 1386 (La. Ct. App. 1986)).

98. *Id.* at 626.

99. *See id.* at 628–30; *see also* Graphia, *supra* note 7, at 800–01.

100. *Lafleur*, 491 So. 2d at 629.

Litvinoff's proposed article meant it intended to incorporate the law under *Meador*.[101]

It is no surprise that the Court concluded that nonpecuniary damages were inappropriate under these circumstances, where there was a purely commercial contract between a farmer and a grain drill manufacturer. The Court could have decided that the nature of the contract involved was not appropriate for nonpecuniary damages and saved the discussion of article 1998 and its conformity with *Meador* for a better case with facts more favorable to an award of nonpecuniary damages.[102] Although the result reached by the Louisiana Supreme Court in *Lafleur* is sound, the Court's discussion in dicta of article 1998 and the *Meador* standard was premature. This discussion was highly illustrative of the Louisiana Supreme Court's insistence upon a narrow reading of article 1998, even when the plain text or drafters' intentions, as reflected in comment (a) to article 1998, may not support such a reading.[103]

2. Young v. Ford Motor Co.[104]

Six years after *Lafleur*, the Louisiana Supreme Court again addressed nonpecuniary damages under article 1998 in *Young v. Ford Motor Co*.[105] *Young* involved the reversal of a trial court's award of nonpecuniary damages.[106] The plaintiff in *Young* purchased a pickup truck to be used in connection with his service station, as well as for recreation and pleasure.[107] The truck,

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101. *Id.* at 629–30. The Court cited Professor Litvinoff's proposals to article 1998: "Moral damages [Damages for pecuniary [sic] loss] may be recovered according to the nature of the contract, or according to the circumstances surrounding an obligor's failure to perform. Such damages shall not be recovered for mere worry or vexation." *Id.* at 629 n.6. According to the Court, the comment that accompanied the proposed article read:

> (a) This article is new. It changes the law in part since it provides that moral damages may be recovered also for the failure to perform an obligation arising from a contract whose object is not for the exclusive "intellectual enjoyment" of the obligee, thereby departing from the rule established in *Meador v. Toyota of Jefferson, Inc.*, 322 So. 2d 802 (1976).

Id.

102. Since *Lafleur* was decided under *Meador*, there was no reason for a detailed analysis of the new law, especially when the purpose of such an analysis was to revive the law as it existed under *Meador*.

103. *See* LA. CIV. CODE art. 1998 cmt. a (2015).

104. Young v. Ford Motor Co., Inc., 595 So. 2d 1123 (La. 1992).

105. *Id.*

106. *Id.* at 1124.

107. *Id.* at 1125.

referred to by the Court as a "lemon," had multiple defects that required maintenance over ten times.[108] Because of the truck's defects, Young's doctor testified that he suffered from depression, was tense and angry, and experienced problems with sex.[109] The jury awarded Young $3,750 in mental anguish damages in connection with the sale of the truck.[110] The court of appeal reversed the damages award, and this was the only issue contested on appeal.[111] *Young* is governed by the provisions on liability of the seller of defective products, which contemplate a damage award to the plaintiff.[112] After concluding that Louisiana law favors restoration of the status quo in actions involving redhibitory defects,[113] and that the articles on conventional obligations apply to redhibitory actions, the Court entered into a discussion of former article 1934 and current article 1998.[114]

Perhaps the most important issue the Court discussed is whether "multiple objects" of an obligation are permitted under the new damage regime.[115] The Court admitted that the Louisiana State Law Institute intended article 1998 to cover obligations involving mixed pecuniary and nonpecuniary objects—that is, the obligation does not need to have an exclusively nonpecuniary object to be within the contemplation of article 1998.[116] Although not advocating Professor Litvinoff's position that all contracts could trigger nonpecuniary damages depending on their nature, the

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108. *Id.* at 1125 n.1.
109. *Id.* at 1125 & n.1.
110. *Id.* at 1124.
111. *Id.* at 1123.
112. *See* LA. CIV. CODE arts. 2531, 2545 (2015).
113. *See* LA. CIV. CODE art. 2520 (2015). Civil Code article 2520 states:

> The seller warrants the buyer against redhibitory defects or vices, in the thing sold.
>
> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.
>
> A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

Id. A redhibitory action is "[a]n action brought to void a sale of a thing having a defect that renders it either useless or so flawed that the buyer would not have bought it in the first place." BLACK'S LAW DICTIONARY 36 (9th ed. 2009).

114. *Young*, 595 So. 2d at 1130–34.
115. *Id.* at 1132.
116. *Id.* at 1131–32.

Court concluded that "[t]he only cases that would qualify for the recovery of this type of damages were those where the plaintiffs could show that they intended, at the time of contracting (and the nature of the contract supported such intention), to gratify a *significant* nonpecuniary interest."[117] Considering all of the above factors, the Court found this was not an appropriate case for nonpecuniary damages, as the purchase of a pick-up truck was not significantly nonpecuniary.[118] The Court was unimpressed with the plaintiff's claim that one reason the truck was purchased was because of the large cab area where he could lay down to ameliorate his back problems.[119] According to the Court, this interest was merely "incidental" and not significantly nonpecuniary to warrant an award of damages under article 1998.[120]

The Court's reasoning for denying nonpecuniary damages, however, is flawed. The Court assumes that in order to avoid a "free for all," which may have ensued under the Litvinoff regime, the Law Institute must have incorporated the "significant nonpecuniary interest" standard.[121] It is true that the Institute was worried about an overly broad damage regime.[122] In *Meador*, the Court made clear its preferred standard—that the nonpecuniary interest had to be the "*principal object of the contract*."[123] Instead of adopting this standard as a bar against the excessive use of nonpecuniary damages, the Legislature adopted an article that mentions absolutely nothing about a significant or principal object requirement.[124] The drafters instead included another phrase to limit recovery—the opening phrase of article 1998, "when the contract, because of its nature."[125]

The results reached by the Court in *Lafleur* and *Young* could be explained by resort to this phrase. The *natures*[126] of the contracts at issue in *Lafleur* and *Young* were to buy and sell a grain drill and a

117. *Id.* at 1132 (emphasis added).
118. *Id.* at 1133.
119. *Id.*
120. *Id.*
121. *Id.* at 1132–33.
122. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 17–20.
123. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 438 (La. 1976) (emphasis added).
124. *See* LA. CIV. CODE art. 1998 (2015).
125. *See id.*
126. Nature in this context is used to describe the qualities or characteristics of a contract. When the article speaks to looking at the "nature of the contract" and whether it was intended to satisfy a nonpecuniary interest, that was likely a reference to contracts whose nonpecuniary elements are immediately apparent.

pickup truck.[127] Neither contract seems to be of the type that contemplates a nonpecuniary interest. The Court could have simply concluded that a breach of a contract for the purchase of a grain drill, or the sale of a truck, without further facts, does not support an award of nonpecuniary damages *because the nature* of these contracts, in the Court's opinion, were not intended to gratify nonpecuniary interests.[128] Although the plaintiffs in both *Lafleur* and *Young* introduced evidence of the existence of a nonpecuniary interest, the Court should have used the approach outlined in article 1998 to conclude that either the nature of the obligation was not appropriate or that the contracts were not intended to satisfy a nonpecuniary interest.[129] Using the actual text of the article to find the non-availability of damages would have been less of a departure from the true text of the Code. In *Lafleur*, former Chief Justice of the Louisiana Supreme Court Pascal Calogero stated that article 1998 "serve[s] to clarify and make more certain under the law the *Meador* resolution."[130] Unfortunately, the clarity Justice Calogero hoped would follow the revision of article 1998 was never realized.[131]

III. THE PROBLEM: ARTICLE 1998 SERVES AS A POOR GUIDE FOR NONPECUNIARY DAMAGE AWARDS IN LOUISIANA

Pre-revision courts regularly denied nonpecuniary damages by determining that the contract at issue did not have principal or significant nonpecuniary objects or interests.[132] The Louisiana Legislature, per the recommendation of the Louisiana State Law Institute, enacted article 1998 and eliminated any discussion of the object of the contract.[133] The Institute hoped that such an elimination would prohibit judges from denying nonpecuniary damages in those cases where nonpecuniary elements were present but not central or principal.[134]

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127. Young v. Ford Motor Co., 595 So. 2d 1123, 1124 (La. 1992); Lafleur v. John Deere Co., 491 So. 2d 624, 626 (La. 1986).

128. *See* LA. CIV. CODE art. 1998 (2015).

129. As mentioned above, the facts of *Lafleur* arose in 1980 before the enactment of article 1998, so the Court correctly employed the *Meador* analysis. *See Lafleur*, 491 So. 2d at 629–30.

130. *Id.* at 629. *See also* Graphia, *supra* note 7, at 801.

131. *See infra* Part III.

132. This was most famously illustrated by *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 433, 437–38 (La. 1976). For a more detailed discussion, see *supra* Part I.B.

133. *See* LA. CIV. CODE art. 1998 (2015).

134. In the Supplemental Memorandum on Damages for Nonpecuniary Losses prepared by Louisiana Law Institute Staff Attorney Alejandro Garro for

Unfortunately, the Institute chose to replace "object" with a fairly obscure standard—one that refers to the "nature" of the contract.[135] The confusion that resulted is not surprising given the similar definitions of "nature" and "object."[136] Both of these concepts shift the focus from the harm or injury felt by the obligee to the conduct of the obligor. However, even if the "nature" of a contract may not point toward nonpecuniary elements, it is still possible for an obligee to suffer nonpecuniary loss.[137] Overcoming the "nature of the contract" hurdle has proven to be a difficult task for litigants and one that seems unnecessary as long as nonpecuniary loss is proven. To this point, the Institute acknowledged that "the expression 'nature of the contract' amounts to a timid change in an area where the commendable policy is to allow recovery of 'nonpecuniary damages' according to the effects of the nonperformance and not to the 'nature,' 'purpose,' or 'object' of the contract."[138]

Although the statement above is evidence of the Louisiana State Law Institute's support for the availability of nonpecuniary damages "according to the effects of the nonperformance and not to the 'nature,' 'purpose' or 'object' of the contract," the Louisiana Supreme Court's application of article 1998 has not embodied this policy.[139] Instead, the Court merely borrowed the old *Meador* standard that required a "principal or significant nonpecuniary

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the Obligations Committee Meeting on July 25, 1980, he stated: "Under the new approach, recovery of 'non-pecuniary damages' is not linked to a deprivation of 'intellectual enjoyment,' nor to the particular 'object' of the contract. No doubt that this kind of change will be welcomed by those who supported a more liberal interpretation of Article 1934(3)." Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 31.

135. *Id.* at 33. *See also* LA. CIV. CODE art. 1998 (2015).

136. The Committee described the term "object" as the "expectation of the contracting parties at the time they entered into the agreement." Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 24. The Law Institute described the term "nature" as what the contracting parties intended the contract to gratify. *See* Louisiana State Law Institute, July 27, 1979, *supra* note 43, at 6.

137. *See, e.g.*, Young v. Ford Motor Co., 595 So. 2d 1123 (La. 1992). The contract at issue was for the purchase of a vehicle, which is likely pecuniary in nature. *Id.* at 1124. However, the plaintiff was still able to put on evidence of nonpecuniary losses—namely, the loss of his vehicle to participate in recreational fishing and the selection of that particular vehicle to lay down and rest his aching back. *Id.* at 1125.

138. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 33.

139. *See id.*; *see, e.g.*, Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433 (La. 1976).

object" and applied it now as a requirement under article 1998—by reading the article to require a "principal or significant nonpecuniary interest."[140] Although at first glance it seems that article 1998 would make major changes to the landscape of Louisiana jurisprudence, if anything it has ushered in more confusion. It is time for the Legislature to once again consider a revision of article 1998 to finally clarify an area of the law that has suffered from enormous obscurity.

A. Comparative Approach

During the 1985 revision, the Louisiana State Law Institute looked to both civilian and common law jurisdictions to draw influence for the Louisiana nonpecuniary damage regime.

1. Civilian Comparison

When the Louisiana State Law Institute proposed article 1998, it cited several civilian jurisdictions that have legislation or doctrine regarding damages for nonpecuniary loss, such as Argentina,[141] Switzerland,[142] Quebec,[143] Germany,[144] and France.[145] Article 1998

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140. *See Meador*, 332 So. 2d at 437–38.

141. *See* Louisiana State Law Institute, July 27, 1979, *supra* note 43, at 5; CÓD. CIV. art. 522 (Arg.) ("In case of breach of contract, the court may grant recovery for the moral damages sustained by the obligee, according to the circumstances giving rise to the obligor's liability.").

142. *See* Louisiana State Law Institute, July 27, 1979, *supra* note 43, at 5 (citing CODE DES OBLIGATIONS, [CO] [Code of Obligations] art. 49, 99 (Switz.)). Article 99 of this Code provides that the rules governing recovery on grounds of quasi-delict are applicable to recovery for breach of conventional obligations. Under article 49, nonpecuniary damages are recoverable in quasi-delict. The Law Institute discussed in detail the Swiss approach to nonpecuniary harm, which is conceptually similar to the French *dommage moral*. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 4.

143. *See* Louisiana State Law Institute, July 27, 1979, *supra* note 43, at 5 (citing Quebec Report 1975 art. 274 ("All prejudice to reparation may be material or moral.")); *see also* Civil Code of Quebec, S.Q. 1991, c. 64, art. 1458 (Can.) ("Every person has a duty to honour his contractual undertakings. Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is bound to make reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.").

144. *See* Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 5; *see also* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT 42, as amended, § 253 (Ger.).

145. *See* Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 8.

was drawn largely from legislation in these jurisdictions, which reflects a willingness to compensate for nonpecuniary harm. Germany, infamous for its abundance of positive law, has spelled out specific circumstances for which nonpecuniary damages are available.[146]

In France, although not having any positive legislation governing nonpecuniary damages in the *Code Napoléon*, the availability of such damages is recognized doctrinally.[147] Article 1149, the general article on damages in the French *Code Civil*, has not been interpreted to restrict damages for nonpecuniary loss, known by the French as *dommage moral*.[148] Unlike the current state of Louisiana law, recovery of *dommage moral* is dependent on the *effects* of the breach, rather than the object of the contract.[149] Professor Litvinoff's proposal in the revision discussion accurately reflects the "effects-based" French approach.[150] Louisiana should embrace the damage-based approach used by other civilian jurisdictions to expand the availability of nonpecuniary damages.

2. Common Law Comparison

Louisiana's hesitance to embrace a damage regime that fully compensates for nonpecuniary injuries may stem from the strong influence of surrounding common law jurisdictions in the United States. The common law has not widely embraced the availability of nonpecuniary damages in breach of contract actions.[151] A renowned expert on common law contracts, Samuel Williston, wrote:

> Mental suffering caused by a breach of contract . . . is not generally considered as a basis for compensation in contractual actions. There are, however, exceptions to this rule in a number of jurisdictions . . . only where the breach also causes bodily harm or the nature of the contract is such that a breach of it is likely to result in serious emotional disturbance. It has also been stated where other than pecuniary benefits are contracted for, damages have been allowed for injury to a person's feelings.[152]

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146. *Id.* at 9.
147. *Id.* at 8. *See supra* Part I.A.
148. *See* Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 8.
149. *Id.*
150. *See supra* note 101 and accompanying text.
151. WILLISTON, *supra* note 19, § 64:7.
152. *Id.*

Similarly, Section 353 of the *Restatement (Second) of Contracts* states: "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[153]

Both of these excerpts show a greater focus on the intent of the obligor who failed to perform, rather than on the type of loss felt by the obligee. Additionally, these excerpts show a punitive element, which is not present in the Louisiana legislation.[154]

Part of the confusion present in Louisiana stems largely from how to characterize the type of contract and the parties' expectations. An easier approach, advocated by Professor Litvinoff, would be to award damages for nonpecuniary loss when incurred, regardless of the nature of the contract and with less emphasis on the behavior of the obligor.[155] When asked in an Obligations Committee meeting whether Louisiana should adopt a framework that would award nonpecuniary damages only for physical injury to persons, like the *Restatement*, Litvinoff responded in the negative.[156] Louisiana courts associate bodily harm with delicts, a different source of liability in the civil law, where damages for mental anguish and pain and suffering are common.[157]

Like Louisiana, other states have struggled to develop case law to handle damages for mental distress in breach of contract actions.[158] The result of these efforts has been varied.[159] In 1881,

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153. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981).

154. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 8. The *Restatement* permits damages for mental suffering when the damage rises to the level of bodily harm. This reflects a common-law policy that not all nonpecuniary harm is compensable. The fact that damages are available after bodily harm is inflicted is likely aimed more at punishing the individual who breached the contract and less at repairing nonpecuniary harm.

155. Louisiana State Law Institute, Minutes of the Meeting of the Council at 122 (June 1981) (on file with the Louisiana State Law Institute) [hereinafter June Minutes].

156. *Id.* at 125.

157. *See* Dane S. Ciolino, Recent Case, Lafleur v. John Deere Co.*: Recovery of Nonpecuniary Damages in Redhibitory Actions*, 61 TUL. L. REV. 704, 705–06 (1987); *see also* CRAWFORD, *supra* note 17, § 18.2.

158. Andre Keith Sanders, Comment, Brown v. Fitz*: A Further Restriction on the Recovery of Damages for Emotional Distress Arising out of Breach of Contract*, 14 AM. J. TRIAL ADVOC. 203, 203–05 (1990).

159. *Id. See, e.g.*, B & M Homes, Inc., v. Hogan, 376 So. 2d 667, 671 (Ala. 1979) (discussing the general rule prohibiting damages for mental anguish with several extraordinary exceptions); Jankowski v. Mazzotta, 152 N.W.2d 49, 51 (Mich. Ct. App. 1967) ("Recovery for such mental anguish, however, has been properly circumscribed within rather narrow limits by the precedents and rules of law applicable in Michigan."); S. Miss. v. Williams, 891 So. 2d 160, 172

Texas became the first state to allow damages for mental anguish in breach of contract actions without other claims and damages.[160] In *So-Relle v. Western Union Telegraph Co.*, the court awarded damages for mental anguish where the defendant telegraph company delayed sending the plaintiff a message about his mother's death, thereby prohibiting him from attending her funeral.[161] The Texas court found that the damages for emotional distress were easily foreseeable because such distress would expectedly result from the death of a loved one.[162] The Texas court overruled itself two years later and then readopted its original position in 1885.[163]

Similarly in 1967, the California Supreme Court awarded damages for emotional distress for the breach of an insurance policy in *Crisci v. Security Insurance Co.*[164] According to the court, the plaintiff purchased her insurance policy for peace of mind and security, not to obtain a commercial advantage.[165] Remarkably, the court stated that damages for emotional distress were foreseeable because of the insurance contract's personal nature.[166]

Only 30 years later, the California Supreme Court in *Erlich v. Menezes* was faced with an action for negligent breach of a contract to construct a home.[167] The plaintiffs contracted with the defendant to build their dream home on an ocean-view lot.[168] After

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(Miss. 2004) (discussing the availability of emotional distress damages in breach of contract cases, the court stated, "It is now undisputed that under Mississippi law a plaintiff can assert a claim for mental anguish and emotional distress in a breach of contract action. However, our decisions over the past several years addressing mental anguish and emotional distress are arguably unclear." (internal citations omitted)).

160. Sanders, *supra* note 158, at 209.

161. C. O. So Relle v. W. Union Tel. Co., 55 Tex. 308, 311, 313–14 (Tex. 1881).

162. *Id.* at 312.

163. *See* Stuart v. W. Union Tel. Co., 66 Tex. 580 (Tex. 1885); Gulf, C. & Santa Fe Ry. Co. v. Levy, 59 Tex. 563 (Tex. 1883); *see also* Comment, 5 CAL. W. L. REV. 88, 91 (1968).

164. *See* Crisci v. Sec. Ins. Co., 426 P.2d 173 (Cal. 1967); Sanders, *supra* note 158, at 213.

165. *Crisci*, 426 P.2d at 179.

166. *Id.* Contrast this with Louisiana, where nonpecuniary damages in breach of contract actions are supposed to be more readily available. In fact, the Louisiana Supreme Court has specifically stated that an insurance policy that covered the plaintiff's home was "not designed to gratify nonpecuniary interests." Sher v. Lafayette Ins. Co., 988 So. 2d 186, 202 (La. 2008). Rather, the Court concluded that the policy was "meant to protect pecuniary interests." *Id.*

167. Erlich v. Menezes, 981 P.2d 978 (Cal. 1999).

168. *Id.*

moving into their new home, the plaintiffs experienced rain that left them with a house that "leaked from every conceivable location," even after attempts to patch leaks, which made the damage worse.[169] After an inspection by another general contractor, the plaintiffs learned that there were defects not only in their roof but also in the stucco, windows, waterproofing, and structure, causing the near-collapse of the home.[170] The couple was so distraught by the defects in their home that the husband had to be rushed away in an ambulance.[171] Additionally, the wife's emotional distress led her to install special emergency lights on their daughter's window so rescue personnel would find her first in the event of an emergency.[172] The trial court awarded the plaintiffs $50,000 each for emotional distress, and this damage award was affirmed on appeal.[173] The California Court of Appeals subsequently reversed the award of damages, stating that "[n]o California case has allowed recovery for emotional distress arising solely out of property damage."[174] The court in *Erlich* indicated that "unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object," recovery of emotional distress damages will be unlikely.[175]

The cases above illustrate the varied and unpredictable approaches taken by courts grappling with emotional distress damages. Although damages for emotional distress and mental anguish may be recoverable in some instances, it is certainly not the norm in common-law states.[176] Additionally, one scholar has described the law governing "non-economic damages" as "disorganized and contradictory at best."[177] Louisiana is consistently cited as one jurisdiction where the law appears relatively liberal.[178]

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169. *Id.*
170. *Id.* at 981.
171. *Id.*
172. *Id.*
173. *Id.* at 981–82.
174. *Id.* at 985.
175. *Id.*
176. "The limiting rules and so-called guidelines adopted by modern American courts regarding the recoverability of non-economic damages in breach of contract actions are disorganized and contradictory at best." Mara Kent, *The Common-Law History of Non-Economic Damages in Breach of Contract Actions Versus Willful Breach of Contract Actions*, 11 TEX. WESLEYAN L. REV. 481, 482 (2005).
177. *Id.*
178. *See, e.g.*, *id.* at 501 (citing Lewis v. Holmes, 34 So. 66 (La. 1903); Pike v. Stephens Imports Inc., 448 So. 2d 738 (La. Ct. App. 1984)); *see also* Ronnie Cohen & Shannon O'Byrne, *Cry Me a River: Recovery of Mental Distress Damages in a Breach of Contract Action—A North American Perspective*, 42 AM. BUS. L.J. 97, 112, 127–28 (2005) (citing several Louisiana cases for their approach on emotional distress, such as *Harvey v. Dietzen*, 716 So. 2d. 911 (La.

Yet, even Louisiana has not been spared from decades of unpredictable jurisprudence.[179] This further highlights the need for a clearer, more effective analysis regarding damages for nonpecuniary loss so Louisiana can serve as a model to lead the way in nonpecuniary damage legislation.

IV. A CALL FOR REVISION: REVIVING PROFESSOR LITVINOFF'S DAMAGE-BASED APPROACH

Despite the Civil Code's mandate, courts have inconsistently applied article 1998, much to the disdain of litigants and scholars. On January 1, 1985, article 1998 replaced former article 1934(3) to become the new legislation governing nonpecuniary damages.[180] Although the drafters intended to create clarity, there remains significant uncertainty regarding the availability of nonpecuniary damages in Louisiana breach of contract actions. Both the construction and interpretation of article 1998, as well as policy considerations, have contributed to this uncertainty. The problem the Law Institute originally hoped to address can be summed up by reference to a report prepared by the Obligations Committee: "The right to recover 'nonpecuniary damages' should not depend upon the 'contractual object' nor upon the 'overriding concern' of the contracting parties; it should depend upon the existence of the nonpecuniary harm and the casual nexum between the breach and the harm."[181]

A. Considerations for a Revised Article 1998

When contemplating revisions to former article 1934, the Louisiana State Law Institute considered fewer restrictions on the availability of nonpecuniary damages but ultimately decided on the current article.[182] It is possible the Committee thought courts would analyze article 1998 *de novo*. In reality, Louisiana courts did

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1998), *Taylor v. Burton*, 708 So. 2d 531 (La. 1998), and *Vick v. National Airlines, Inc.*, 409 So. 2d 383 (La. Ct. App. 1982)).

179. *See supra* Parts I–II.

180. *See* Act No. 331, 1984 La. Acts 156.

181. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 25.

182. For five proposed articles the Obligations Revision Committee considered adopting as article 1998, see Louisiana State Law Institute, Supplemental Memorandum on Damages for Nonpecuniary Losses, Prepared for the Meeting of Council (Sept. 18, 1981) (on file with the Louisiana State Law Institute).

not depart from the pre-revision jurisprudence.[183] Another potential reason the Law Institute adopted this article may be because it thought the article reflected the best compromise of all competing interests. These interests include the purpose behind awarding nonpecuniary damages, the fear that nonpecuniary damages may turn into punitive damages, a convolution of the law of delicts and the law of obligations, the approach taken by other states, and the "multiple object" debate the Louisiana Supreme Court grappled with in *Meador v. Toyota of Jefferson*.[184] Although the Law Institute properly considered all of these factors, it ultimately produced legislation that furthered the confusion present in the jurisprudence and scholarly commentaries. Accordingly, the Louisiana State Law Institute should reconsider the policy considerations and competing interests to amend article 1998 and create a workable nonpecuniary damage regime.

1. Reasons for Reparation

A new damages law must consider what values drive an award of nonpecuniary damages in a breach of contract action. If damages are awarded to repair all injured interests within reason, then nonpecuniary damages should be available as a remedy when, regardless of the nature of the contract, any nonpecuniary interest has been injured.[185] The Obligations Committee considered how to measure damages when the harm suffered by the obligee is exclusively moral.[186] This type of situation could arise where there is a breach of contract and there is no pecuniary harm suffered. The modern trend is to allow damages for nonpecuniary recovery only where there is also a pecuniary claim, rendering the "exclusively moral" situation above virtually non-compensable.[187] However, coupling a nonpecuniary loss with even the slightest pecuniary loss may give the finder of fact security that there is some degree of certainty in the harm felt. Only seldom will there

183. See *supra* text accompanying note 130 for Chief Justice Calogero's statement post-revision that article 1998 "serve[s] to clarify and make more certain under the law the *Meador* resolution of the pertinent legal issue under the former article 1934(3)." Lafleur v. John Deere Co., 491 So. 2d 624, 629 (La. 1986).

184. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433 (La. 1976).

185. Litvinoff, *Moral Damages*, *supra* note 5, at 3.

186. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 1. This is why the few common law jurisdictions that contemplate damages for mental anguish in breach of contract cases often require that it accompany an independent tort. Cohen & O'Byrne, *supra* note 178, at 113.

187. Litvinoff, *Moral Damages*, *supra* note 5, at 4.

be breach of contract actions where *absolutely no* pecuniary harm is felt. Thus, imposing this requirement would rarely cause distress for many litigants. In the alternative, allowing judges to use discretion in awarding damages for nonpecuniary loss would be a better way to ensure fairness to all litigants. Judges would then still be at liberty to award nonpecuniary damages, even when an obligee suffers an exclusively nonpecuniary loss in extreme circumstances.[188]

2. Avoidance of Excessive Punitive Damages

Because damages for nonpecuniary loss are often not susceptible of precise measurement, the Obligations Committee was concerned that they may become punitive in nature.[189] This concern stems from Louisiana's general dislike of punitive damages.[190] The Court in *Young v. Ford Motor Co.* pointed to the apparent rejection by the Obligations Committee of an article that would allow nonpecuniary damages in every kind of contract for "fear of opening the door to punitive damage awards."[191] Punitive damages are largely a common law concept,[192] available in

188. *See* LA. CIV. CODE art. 1999 (2015). For example, a British couple recovered damages for emotional distress in a breach of contract action against their wedding videographer who failed to capture their most cherished moments. Jaya Narain, *Is This The World's Worst Wedding Video? Cameraman Who Filmed Backs of Heads, Grass and People Who Weren't Even Attending Ordered to Pay Compensation*, MAIL ONLINE (Mar. 21, 2011, 10:49), http://www.dailymail.co.uk/femail/article-1368143/Wedding-videographer-ordered-pay-compensation-dreadful-350-video.html, archived at http://perma.cc/LV3Q-B8NM.

189. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 5. *See also* LA. CIV. CODE art. 1995 (2015) (Measure of Damages: "Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived."). When compared to damages for nonpecuniary loss, this article provides a greater degree of certainty in what quantities and criteria for measurement are relevant.

190. For more information about punitive damages in Louisiana, see Brooksie L. Bonvillain, Comment, *Slaying the Trojan Horse:* Arabie v. Citgo *and Punitive Damages under Louisiana's Conflict-of-Laws Provisions*, 74 LA. L. REV. 327, 330 (2013) (discussing Louisiana's "strong legislative policy against awarding punitive damages, except in limited statutorily excepted situations"). *See also* John W. deGravelles & Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579 (2010).

191. Young v. Ford Motor Co., 595 So. 2d 1123, 1131 (citing June Minutes, *supra* note 155, at 8–11).

192. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 5.

Louisiana only in extraordinary circumstances.[193] Punitive damages are inconsistent with Louisiana's civil law system which values compensation to make the aggrieved whole again and to repair the loss.[194] Thus, Louisiana's general prohibition on punitive damages is consistent with the civil law's contempt for damages designed to inflict punishment.[195] Some members of the Obligations Committee and the Louisiana Supreme Court were worried that a very broad approach to nonpecuniary damages would result in abuse by litigants and a "back-door" approach to punitive damages.[196] The following short excerpt from the Obligations Revision Committee meeting minutes reflects this concern:

> Truman Woodward: I believe that the Council is ready to overrule *Meador* but only to an extent that we do not open the door to punitive and other forms of damages.
> Frank Middleton: There ain't no way. If we overrule *Meador*, we will open the door to other forms of damages.[197]

To award nonpecuniary damages to every obligee who suffers mental distress from an obligor's nonperformance may appear somewhat punitive.[198] Despite this appearance, these damages are not intended to punish; rather, they merely compensate for a legitimate loss incurred by the plaintiff.[199] In the hypothetical involving the wine owner's destroyed wine collection,[200] awarding nonpecuniary damages would be far from punitive—the damages would instead compensate for the loss of a special family collection sustained as a result of the obligor's nonperformance. Louisiana's commitment to allowing punitive damages in only the most extreme circumstances may be one reason why the Louisiana Supreme Court has been hesitant to read article 1998 liberally and allow recovery in more cases. As a result, article 1998 should be

193. *See, e.g.*, LA. CIV. CODE art. 2315.3 (2015) (providing for exemplary damages in certain cases involving child pornography); LA. CIV. CODE art. 2315.4 (2015) (providing for exemplary damages in certain cases involving the intoxicated operation of a motor vehicle).

194. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 6.

195. *Id.* ("The idea of punishment is totally foreign to the civil law . . . .").

196. *Young*, 595 So. 2d at 1131 (citing June Minutes, *supra* note 155).

197. June Minutes, *supra* note 155, at 11–12.

198. *See* A.L. Barton, Young v. Ford Motor Co.*: Contorts—Nonpecuniary Damages in Redhibitory Actions*, 67 TUL. L. REV. 336, 344 (1992).

199. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 6.

200. *See supra* Part I.

revised to emphasize the distinction between nonpecuniary damages and punitive damages. This aim could be easily achieved by adding commentary to article 1998 stating the drafters' intention to leave the law surrounding punitive damages untouched and clarifying that nonpecuniary damages are not punitive in nature but are instead meant to compensate for nonpecuniary loss. Additionally, a provision allowing for judicial discretion would encourage judges to exercise caution about claims that appear "punitive."

3. Distinctions Between the Laws of Obligation and Delict

A third policy consideration for an amended nonpecuniary damages article concerns the law of delicts.[201] It is well-settled that delictual conduct gives rise to a claim of damages for mental and emotional distress, pain and suffering, and other nonpecuniary damages.[202] Historically, these damages have always been available in tort with little or no availability in contract.[203] However, because article 1998 clearly states that nonpecuniary damages are available in nonperformance of contract actions under certain circumstances, there is less of a reason to draw such distinctions between these two areas of law in the damages context.[204] It is not equitable to allow lesser damages for a plaintiff who was the victim of a breach of contract that injured a nonpecuniary interest merely because the action sounded in contract rather than tort. This was the principal argument of Justice Dixon in his dissent in *Meador*.[205] Professor Litvinoff relied

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201. In Louisiana, wrongful conduct is often called a "delict" as opposed to a tort. Louisiana Civil Code article 2315 (2015) is the primary article governing delictual liability. The article states:

> A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> B. Damages may include loss of consortium, service and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged.

LA. CIV. CODE art. 2315 (2015).

202. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 28.

203. LITVINOFF, *supra* note 3, § 6.7, at 163.

204. *Id.* at 164.

205. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 438–39 (La. 1976) (Dixon, J., dissenting).

heavily on Justice Dixon's position, stating: "I want to overturn *Meador v. Toyota*. I have relied upon Justice Dixon's dissent in *Meador*. I don't believe that there is any reason for not allowing recovery for nonpecuniary damages in contractual cases."[206]

Perhaps the hard line between damages in tort and contract is no longer necessary. For example, the Hawaii Supreme Court formulated a unique solution to damages for emotional distress in breach of contract actions.[207] In *Dold v. Outrigger*, the defendant hotel did not provide hotel rooms to the plaintiff after it contracted to do so.[208] The Hawaii Supreme Court awarded the plaintiffs damages for emotional distress based on the defendant's consistent overbooking.[209] The Hawaii Supreme Court fashioned this remedy for emotional distress in a breach of contract action, calling it "a fusion of the doctrines of tort and contract."[210]

Eight years later, the Hawaii Supreme Court awarded damages to a restaurant operator in *Chung v. Kaonohi Center Co.*, after the defendant shopping mall owner misrepresented the availability of a lease.[211] The plaintiffs spent a significant amount of money in reliance on the availability of the lease.[212] The Hawaii Supreme Court held that, despite the clearly commercial nature of this contract, the "wanton and reckless nature of the breach" justified an award of damages for emotional distress.[213] Again, the Hawaii Supreme Court had no qualms about designating certain conduct so offensive that it gives rise to tort liability, even though it occurred in the context of a breach of contract claim.[214]

The Hawaii Supreme Court likely engaged in the fusing of two well-established, yet distinct, areas of law to satisfy its desire to repair injuries suffered by the plaintiffs. Although these cases have been viewed negatively by more recent cases, they are examples of judicial desperation to fashion a remedy that will adequately compensate plaintiffs.[215] Clarifying the law surrounding nonpecuniary damages would solve that problem, which may be

206. June Minutes, *supra* note 155, at 1.
207. Sanders, *supra* note 158, at 214.
208. Dold v. Outrigger, 501 P.2d 368, 370 (Haw. 1972).
209. *Id.* at 372.
210. *Id.*
211. Chung v. Kaonohi Ctr. Co., 618 P.2d 283 (Haw. 1980).
212. *Id.* at 286.
213. *Id.* at 289.
214. *Id.*
215. *See* Francis v. Lee Enters., Inc., 971 P.2d 707 (Haw. 1999) (abrogating *Chung* and *Dold*).

common to many courts—merely awarding punitive damages because there is no other option to compensate the plaintiff.[216]

However, the strong policy interest in keeping tort and contract recovery separate is embedded in the very root of the tort and contract doctrines themselves. Claims for breach of contract presuppose that judges will look to the intent of the parties—which is why damages in contract depend on their "foreseeability."[217] For this reason, foreseeability stands as the strongest argument against a less-restrictive nonpecuniary damage regime.[218]

4. Foreseeability as a Limit to Nonpecuniary Damages

Generally, damages in breach of contract actions are limited to those that arise naturally "according to the usual course of things, from such breach of contract itself," or those that are known to the parties and are thus contemplated.[219] Louisiana has accepted and codified this general rule of foreseeability into Civil Code articles 1996 and 1997.[220] Article 1996 governs obligors in good faith and holds them liable only for damages foreseeable at the time the contract was formed.[221] In contrast, article 1997 holds obligors in bad faith liable for all damages, foreseeable or not, as long as they are a direct consequence of the obligor's breach.[222] Articles 1996

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216. *See, e.g.*, Hibschman Pontiac, Inc. v. Batchelor, 362 N.E. 2d 845 (Ind. 1977). *Hibschman* was cited by Professor Litvinoff for the proposition that "the common law intended to grant recovery for the 'moral damage' sustained by the carowner [sic] but, for the lack of a better instrument had to resort to the 'punitive damages' instead." *Id.*

217. *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). The *Hadley* court famously articulated the rule of foreseeability:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Id. at 151.

218. *See* Bloomfield, *supra* note 52, at 556. In discussing the effect of foreseeability on contractual damages, Bloomfield stated: "[I]f an obligor were faced with nonpecuniary damage liability when nonpecuniary interests were not intended to be served by the contract, unfairness, overdeterrence and a fundamental inconsistency with the theory of contracts would result." *Id.*

219. HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 14:10, Foreseeability of Damages—General and Special Damages: *Hadley v. Baxendale* (3d ed. 2013).

220. *See* LA. CIV. CODE arts. 1996–1997 (2015).

221. *See* LA. CIV. CODE art. 1996 (2015).

222. *See* LA. CIV. CODE art. 1997 (2015).

and 1997, when read *in pari materia* with article 1998, act as a limit on nonpecuniary damages.[223]

The foreseeability principle is also incorporated directly into article 1998.[224] The first paragraph includes the phrase "because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss."[225] In situations where the obligor has knowledge of the special, nonpecuniary circumstances surrounding the obligation, the obligee's nonpecuniary loss will have been both foreseeable and a direct consequence.[226] Additionally, article 1998 contains a reference to the obligor's knowledge of nonpecuniary interests at the time of the *nonperformance*.[227] Thus, the damage expectancy at the formation of the contract is not the only inquiry; rather, if an obligor in good faith was aware of the nonpecuniary interest at either the formation of the contract *or* the nonperformance, then nonpecuniary damages are foreseeable and appropriate.[228]

Under former article 1934, Professor Litvinoff considered another way that the obligor's breach may give rise to nonpecuniary damages: if the breach is surrounded by circumstances such that "the obligor cannot ignore that some form of mental suffering will result for the obligee."[229] This can best be summarized by the manner in which the breach occurred and the surrounding circumstances of the breach.[230] This method of recovery is also incorporated into article 1998 in both the first paragraph and potentially the second paragraph.[231] This situation will often involve

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223. *See* LA. CIV. CODE art. 13 (2015) ("Laws on the same subject matter must be interpreted in reference to each other."); *see also* Barbara J. Van Arsdale, Tracy Bateman Farrell, & Tom Muskus, *§ Provisions in pari materia*, 73 AM. JUR. 2d *Statutes* § 95 (2013). The term "*in pari materia*" means that pieces of legislation should be read together in context to interpret their meaning, even if there is not an explicit reference to the other legislation. *Id.*

224. LA. CIV. CODE art. 1998 (2015).

225. *Id.*

226. Litvinoff, *Moral Damages*, *supra* note 5, at 24.

227. *See* LA. CIV. CODE art. 1998 (2015). Nonperformance of an obligation is the civilian equivalent of common law breach of contract. *See* LA. CIV. CODE art. 1757 (2015).

228. Litvinoff, *Moral Damages*, *supra* note 5, at 24.

229. *Id.* at 25. *See, e.g.*, Vogel v. Saenger Theatres, 22 So. 2d 189 (La. 1945). In *Saenger*, the Louisiana Supreme Court awarded the plaintiff damages for mental distress as a result of the obligor's failure to allow them into the movie theatre. *Id.* at 192. The Court found the plaintiff's physical condition hinged on the "kind and character" of the elements surrounding the obligor's breach. *Id.*

230. Litvinoff, *Moral Damages*, *supra* note 5, at 25–26.

231. Louisiana Civil Code article 1998 provides that:

a bad faith obligor, who would be liable for all damages regardless of their foreseeability, as long as they are a direct consequence of the nonperformance.[232]

The principle of foreseeability incorporated in article 1998 should comfort courts because obligors who are not apprised of nonpecuniary elements of a contract cannot, under the current law, be held liable for nonpecuniary losses unless their nonperformance occurred in bad faith.

5. Clarification on the Second Paragraph of Article 1998

The second paragraph of article 1998 states: "Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee."[233] This paragraph provides a loose and subjective standard for which nonpecuniary damages are available. It appears this standard would be easier to meet than the onerous "significance" requirement jurisprudentially imposed on the first paragraph. However, cases that cite this part of the article are few and far between.

Comment (d) to article 1998 states that an obligee may recover damages for nonpecuniary loss when the "obligor fails to perform in circumstances that give rise to the presumption that the obligee's embarrassment or humiliation was intended by the obligor."[234] This comment encompasses Professor Litvinoff's idea that the manner of the breach may warrant nonpecuniary damages.[235] Whether comment (d) is meant to apply to the "feelings" aspect of the second paragraph of article 1998 is not certain. The relationship between the second paragraph and bad faith obligees is also unsettled. The "feelings" standard, with more detail, could be a viable option for litigants to recover nonpecuniary damages when needed.

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.
>
> Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

LA. CIV. CODE art. 1998 (2015).

232. LA. CIV. CODE art. 1997 (2015).

233. LA. CIV. CODE art. 1998 (2015).

234. LA. CIV. CODE art. 1998 cmt. d (2015).

235. Litvinoff, *Moral Damages*, *supra* note 5, at 24–26.

The court's reticence in applying the second paragraph is understandable. The article gives no indication to what degree the feelings of the obligee need to be aggrieved, or what it means to intend to aggrieve.[236] In the case of intentional breach of contract, does the mere awareness by the obligor that the feelings of the obligee may be aggrieved by the obligor's nonperformance mean the same thing as intending to aggrieve them? In *Aucoin v. Southern Quality Homes*, Justice Knoll addressed the second paragraph of article 1998 in her dissenting opinion.[237] The trial court found the seller and manufacturer in bad faith, due to their knowledge of the redhibitory defects present in the plaintiff's home.[238] Although the majority reversed the trial court's award of nonpecuniary damages, Justice Knoll disagreed.[239] Justice Knoll, in discussing the application of paragraph two to this case, stated:

> In my view, finding a manufacturer in intentional bad faith is sufficient to prove the manufacturer "intended, through his failure, to aggrieve the feelings of the" purchaser. In this case, it is clear the plaintiff's repeated demands to the manufacturer to repair the defective mobile home fell upon deaf ears and aggrieved the plaintiff. Thus, I find the trial court was correct in awarding nonpecuniary damages.[240]

Justice Knoll's dissent could finally provide guidance on situations when the second paragraph of article 1998 could apply. As the article stands now, the second paragraph is an unworkable and easily manipulated standard, which likely explains the courts' and litigants' hesitance to invoke it. When amending article 1998, the drafters should attach commentary indicating to what situations the second paragraph could apply.

6. The "Multiple Objects" Debate

Perhaps the most important of the suggested considerations is a clear direction on whether nonpecuniary elements need to be significant to merit recovery. There have been several standards employed by the courts to determine whether nonpecuniary damages are available, most notably: (1) whether the *exclusive* or

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236. LA. CIV. CODE art. 1998 (2015).
237. Aucoin v. S. Quality Homes, LLC, 984 So. 2d 685, 699 (La. 2008) (Knoll, J., dissenting).
238. *Id.* at 689.
239. *Id.* at 699.
240. *Id.* at 700. *See also* Beasley v. Ed's Mobile Homes, Inc., 824 So. 2d 383 (La. Ct. App. 2002); Ducote v. Perry's Auto World, Inc., 745 So. 2d 229 (La. Ct. App. 1999).

principal object of the contract was intellectual enjoyment,[241] and (2) whether the contract was intended to satisfy a *significant* nonpecuniary interest.[242] The second of the two standards listed above has been used by Louisiana courts even after it became evident that article 1998 was silent on any significance requirement.[243] The silence of article 1998, coupled with the shift in terms by the Louisiana Supreme Court from "principal" or "exclusive" to "significant," has been the source of extreme confusion.[244] In lay terms,[245] "significant" and "principal" simply do not mean the same thing.[246] However, courts seem to equate these two adjectives, as indicated by its use of them almost interchangeably in the jurisprudence. Although these adjectives have burdened courts because of their use by the Louisiana Supreme Court, the analysis of these terms should be inconsequential because they did not appear in former article 1934 and still do not appear in current article 1998.[247] The assumption that these words have the same meaning has been the root of much confusion and underscores the need for clarity on this point.

The policy decision reached by the committee "was to limit nonpecuniary damages to those types of contracts that were made to gratify nonpecuniary interests."[248] Thus, the committee decided not to require an *exclusively* nonpecuniary interest, which led to the wording "intended to gratify *a* nonpecuniary interest."[249] This "multiple objects" debate has been argued in cases and

241. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 437 (La. 1976).
242. Young v. Ford Motor Co., 595 So. 2d 1123, 1132 (La. 1992).
243. *See, e.g.*, *id.* at 1124.
244. Barton, *supra* note 198, at 345.
245. *See* LA. CIV. CODE art. 9 (2015) ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.").
246. Merriam Webster dictionary defines "significant" as "having meaning; especially; suggestive; having or likely to have or effect; important." *Significant*, MERRIAM WEBSTER, www.merriam-webster.com/dictionary/signify cant, archived at http://perma.cc/BA44-X6G4 (last visited Mar. 20, 2015). In contrast, Merriam Webster defines "principal" as "most important." *Principal*, MERRIAM WEBSTER, www.merriam-webster.com/dictionary/principal, archived at http://perma.cc/F8L9-UXF8 (last visited Mar. 20, 2015).
247. *See* LA. CIV. CODE art. 1934 (repealed 1985); LA. CIV. CODE art. 1998 (2015).
248. Louisiana State Law Institute, Meeting of the Council at 144 (Sept. 18–19, 1981) (on file with the Louisiana State Law Institute).
249. *See* LA. CIV. CODE art. 1998 (2015).

commentary throughout the state without much success.[250] Courts have classified obligations into three general but distinct categories:

1. Where the exclusive object of the contract is physical (pecuniary) gratification, nonpecuniary damages are unavailable.[251]

2. Where the exclusive object of the contract is intellectual (nonpecuniary) gratification, nonpecuniary damages are available.[252]

3. Where there are two principal objects of a contract, one physical and one intellectual, nonpecuniary damages are available.[253]

The interesting question lies within this final category. Purely because of jurisprudential gloss, it is important to decide if it is possible to have two principal or significant objects of a contract.[254] Courts and scholars have not attempted to apply mathematical percentages to these objects—nor should they try.[255] Even after the enactment of revised article 1998, where the term "object" is no longer present in the article, the courts continued to apply the jurisprudentially imposed standard under a different

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250. *See, e.g.*, Young v. Ford Motor Co., 595 So. 2d 1123, 1129 (La. 1992); Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 437 (La. 1976); Barton, *supra* note 198, at 345; Bloomfield, *supra* note 52, at 552; Graphia, *supra* note 7, at 802; Litvinoff, *Moral Damages*, *supra* note 5, at 3; Bruce V. Schewe & Debra J. Hale, *Review of Recent Developments: 1991–1992*, 53 LA. L. REV. 917, 923 (1993).

251. H. Alston Johnson III, *The Work of the Louisiana Appellate Courts for the 1976–1977 Term-Obligations*, 38 LA. L. REV. 345, 346 (1978).

252. *Id.*

253. *Id.*

254. The reason that this inquiry is determined by "jurisprudential gloss" is because article 1998 makes no mention of any requirement of significance. This is a purely judicial innovation. *See* LA. CIV. CODE art. 1998 (2015).

255. "As repeatedly recognized by the Louisiana jurisprudence, emotional loss, unlike financial loss, does not lend itself to mathematical analysis and computation." LITVINOFF, *supra* note 3, § 6.3, at 157.

> [T]he task of awarding damages for such loss is a unique kind of human endeavor in that it requires the trier of fact not only to consider the many factual circumstances that are particular to each individual case, but also to have at least a working understanding of human nature in all its sometimes bewildering complexity.

Id. § 6.3, at 158.

name: "significant interest."[256] An interest can be significant even though it is not the *most significant* or even the principal interest. However, the Louisiana Supreme Court has consistently voiced hostility to the idea of nonpecuniary damages and instead treated these objects as mutually exclusive. It is unknown on which side of this debate the current Supreme Court would fall.

7. Louisiana Lower Courts Favor Nonpecuniary Damages

Notwithstanding the Louisiana Supreme Court's hostility to nonpecuniary damages, the Obligations Committee should consider the fact that Louisiana courts have been more willing to grant damages for nonpecuniary loss. In *Chaudoir v. Porsche Cars of North America*, the Third Circuit Court of Appeal awarded nonpecuniary damages to the Chaudoirs who purchased a top-of-the-line, hand-built car from Porsche.[257] Although the car was held out to be "the finest car in the world," the Chaudoirs experienced numerous malfunctions with the car over the course of the next year.[258] The Third Circuit concluded that this was not just a standard vehicle; rather, it was purchased to satisfy a nonpecuniary interest, meeting the requirements of article 1998.[259]

Similarly, in *Smith v. University Animal Clinic, Inc.*, the Third Circuit affirmed an award of nonpecuniary damages against the defendants who breached a contract of deposit.[260] The plaintiffs dropped their five cats at the defendant's clinic for boarding and grooming.[261] Shortly after the cats' arrival, the collar tag of one of the cats was switched with another cat.[262] The plaintiffs' cat was mistakenly sent to another client's home where it escaped and was never found.[263] Although the court found nonpecuniary damages

256. *E.g.*, Jones v. Winnebago Indus. Inc., 92 So. 3d 1113, 1121 (La. Ct. App. 2012).

257. Chaudoir v. Porsche Cars of N. Am., 667 So. 2d 569, 577–78 (La. Ct. App. 1995).

258. *Id.* at 572. Among the problems reported to the dealership, a few were: "the rubber on the front and rear windshield wipers fell apart" when used; "driver's side remote mirror did not work; the luggage cover was faded; one of the interior lights was out; the floor mats and wheel locks were missing; the leather seats were dull;" leaking fuel; inoperative radiator cooling flaps; electronic functions on the seats were not working; air condition was not blowing cool air during the summer; and many more problems. *Id.* at 572–73.

259. *Id.* at 577–78.

260. Smith v. Univ. Animal Clinic, Inc., 30 So. 3d. 1154, 1158 (La. Ct. App. 2010).

261. *Id.* at 1155.

262. *Id.*

263. *Id.* at 1155–56.

were appropriate, it did not award any damages beyond the charges that the animal clinic had already waived.[264]

Additionally, in *Matherne v. Barnum*, the First Circuit awarded nonpecuniary damages to homeowners Michael and Carrie Matherne for damage done to constructions near their "dream home."[265] The Mathernes contracted with the defendant to construct a bulkhead, boat slip, and deck on their waterfront property.[266] Within the next several years, the Mathernes had significant problems with these constructions, which resulted in structural damage ultimately requiring replacement.[267] The court found that the work around the exterior of the home "was also meant to be a major source of intellectual enjoyment for the Mathernes as they lived in their 'dream home' with beautiful landscaping and water access by boat."[268]

The Louisiana Supreme Court denied writs in all three of these cases.[269] These denials suggest that the current composition of the Supreme Court may take a more liberal position on the availability of nonpecuniary damages in nonperformance of contract actions; although without a case on point this is merely speculative. Currently, litigants and judges can only rely on cases to guide their interpretation of article 1998. Unfortunately, this reliance provides little predictability based on the fact-specific nature of such cases. To be in accordance with Louisiana's civilian tradition, the Legislature should begin the process of revising article 1998 yet again so courts and litigants will no longer have to resort to unpredictable jurisprudence.

B. Recommendation for Amended Article 1998

Many critical commentaries of article 1998 and the applicable case law can be traced back to one overarching principle—there are individuals who are suffering nonpecuniary loss as the result of an obligor's nonperformance who are not receiving nonpecuniary damages. This *lacuna* is largely due to the fact that the courts' main concern is not the loss suffered by the obligee. Rather, other factors remain primal in the courts' view—namely the purpose or motive of the contract and how incidental the nonpecuniary

264. *Id.* at 1159.
265. Matherne v. Barnum, 94 So. 3d. 782, 792–93 (La. Ct. App. 2012).
266. *Id.* at 785.
267. *Id.*
268. *Id.* at 791.
269. Matherne v. Barnum, 90 So. 3d 442 (La. 2012); Smith v. Univ. Animal Clinic, Inc., 36 So. 3d 247 (La. 2010); Chaudoir v. Porsche Cars of N. Am., 673 So. 2d 1033 (La. 1996).

interest or object is.[270] Louisiana courts continue to hold that the majority of situations involving nonpecuniary interests do not fit into either paragraph of article 1998. There was hope that the Louisiana Supreme Court would liberally interpret article 1998 to find that any degree of nonpecuniary interest in a contract would suffice to trigger nonpecuniary damages. Unfortunately, that hope never came to fruition.

The first paragraph of Civil Code article 1998 should be revised to cover situations where, *regardless of its nature*, a contract is intended to satisfy a nonpecuniary interest. This reflects the primacy of the nonpecuniary harm felt by the obligee over any other factor. Accordingly, article 1998 should be amended to read as follows:

> Damages for nonpecuniary loss may be recovered when a contract, ~~because of its nature~~ *regardless of its nature*, *gratifies any nonpecuniary interest* and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause nonpecuniary loss.
>
> *In addition*, regardless of the nature of the contract *and whether or not the obligor knew or should have known that his failure to perform would cause that kind of loss*, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee, *such as in the case of intentional nonperformance. Such damages may not be recovered for mere worry or vexation*.[271]

This change would provide damages to the wine collector described at the opening of this Comment, as well as any other obligee who suffers a nonpecuniary loss that, in the interest of justice, requires reparation.[272]

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270. Bloomfield, *supra* note 52, at 542.

271. Additions are noted in italics. Current article 1998 is reproduced here as a comparison:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.
>
> Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

272. As described *supra* Part IV.A.4, the availability of nonpecuniary damages is always dependent upon foreseeability. The wine collector, discussed

The first paragraph of the proposed revision eliminates the "nature of the contract" phrase and instead shifts the main focus to whether there is *any* nonpecuniary interest known to the obligor at the formation or nonperformance of the obligation. The drafters included the "nature of the contract" language in article 1998 to ensure that nonpecuniary damages are awarded only for breached contracts that were intended to gratify a nonpecuniary interest.[273] This goal seems to have been over-accomplished and is one reason courts have applied an overly restrictive analysis. Under this model, the nature of the contract is irrelevant as long as a nonpecuniary interest exists. Contracts that have a nonpecuniary nature are still encompassed in this article because of their nonpecuniary interests—not because of their nonpecuniary nature.

The proposed article retains recovery due to the circumstances surrounding an obligor's failure to perform—but is made clearer by a reference to any nonpecuniary interest. Additionally, retaining the word "may" allows room for judicial discretion, as contained in the former article.[274] This discretion allows a judge to weigh the competing interests of the litigants against the desire to keep frivolous claims for "mere worry or vexation," common to all contracts, out of court.[275]

This new provision reflects the "Litvinoff approach," which allows for recovery of nonpecuniary damages in breach of contract actions where the breach caused a nonpecuniary loss.[276] During the 1985 revision, the Obligations Committee discussed the "Litvinoff approach," stating: "If the obligee proves that the obligor's noncompliance with his obligation caused nonpecuniary losses, why should contracts having 'objects' primarily of intellectual gratification be treated differently from those having 'objects' primarily of physical gratification?"[277] The second paragraph adopts Justice Knoll's dissent in *Aucoin* and clarifies that in instances where an

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in the Introduction, could recover damages for nonpecuniary loss under revised paragraph one, because of his nonpecuniary interest in the collection and the obligor's knowledge of such interests due to the circumstances surrounding the formation of the contract.

273. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 33.

274. The court also has the ability to determine the reasonable assessment of damages if they are insusceptible of price measurement. *See* LA. CIV. CODE art. 1999 (2015).

275. *See* LA. CIV. CODE art. 1998 cmt. e (2015).

276. Litvinoff, *Moral Damages*, *supra* note 5, at 3–4.

277. Supplemental Memorandum on Damages for Nonpecuniary Losses, *supra* note 2, at 16.

obligor breaches in bad faith, nonpecuniary damages are available whether or not they were foreseeable.[278]

This proposed revision attempts to serve as a guide for nonpecuniary damage awards in Louisiana. A cause-based approach to nonpecuniary damages has proven to be confusing and unworkable. By making damages for nonpecuniary loss under 1998 dependent solely on the extent of the harm suffered, courts can engage in a simpler, more direct analysis to determine whether damages are appropriate.

CONCLUSION

Louisiana courts and scholars alike have grappled with when and to what extent nonpecuniary damages are available in actions for nonperformance of contractual obligations. The major problem identified in this Comment is the inability to recover nonpecuniary damages in situations where the nature of the contract may not be pecuniary or the pecuniary interest is not significant, yet the obligor's failure to perform causes a nonpecuniary loss. The Louisiana Supreme Court has not interpreted article 1998 to cover such situations, forming an inequitable *lacuna* that must be remedied. This gap is the source of much criticism by commentators, litigants, and courts. Plaintiffs suffering nonpecuniary harm, like the wine collector, should be allowed to recover damages for their nonpecuniary loss, just like any other loss. The proposed revision—which eliminates the "nature of the contract" language and definitively ends the "multiple object" debate—embraces Professor Litvinoff's damage-based approach and would bring Louisiana's approach in harmony with many leading civilian jurisdictions. A revision of article 1998 is necessary to finally bring clarity to an area of the law that has plagued Louisiana courts for decades.

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278. Aucoin v. S. Quality Homes, LLC, 984 So. 2d 685, 699–701 (La. 2008) (Knoll, J., dissenting).

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