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[See table of contents](#)

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# ON THE NECESSITY OR DESIRABILITY OF CONSUMERISM-INSPIRED REVISION OF THE LOUISIANA CIVIL CODE — A SUMMARY OF RESEARCH UNDERTAKEN AND TENTATIVE CONCLUSIONS REACHED\*

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## I. — INTRODUCTORY OBSERVATIONS.

In 1948 the Louisiana legislature charged the Louisiana State Law Institute with the task of preparing a project for the revision of the Civil Code of Louisiana.<sup>1</sup> The legislature's action was a recognition that the conditions of life had greatly changed since adoption in 1870 of the "Revised Civil Code of the State of Louisiana," itself a revision made necessary by various changed circumstances during the period 1825-1868.<sup>2</sup> The need for revision of the Code was not a problem indigenous to Louisiana. Professor Yiannopoulos, for example, has noted in an historical context that, at a certain point in time, the Roman civil law "was rapidly becoming inadequate to deal with the needs of citizens in matters of trade or in connection with new forms of economic activity."<sup>3</sup> With respect to the need for revision at the mid-point of the twentieth century, Professor Yiannopoulos relates that, "In light of changed conditions, the conceptual framework of the Louisiana Civil Code of 1870 [had] proved analytically deficient in certain instances."<sup>4</sup> Perhaps no better example of that thought can be provided than that of the law of Sales and Obligations as applied to what has become known as the "consumer transaction," a term or concept undoubtedly unknown in 1870, and one certainly not recognized then as requiring any specialized attention in Code revision. Today, however, it may be true — as it was in 1948 — that revision of the Louisiana Civil Code, with particular attention on consumer transactions, is "desirable not only for systematic purposes but also in order to establish a clear correspondence between the legal precept in the Code and in actual practice."<sup>5</sup>

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\* Prepared for The Association Henri Capitant Quebec — Louisiana Session 1978. Symposium on Consumer Protection. The Research summarized herein has been undertaken as a project of the Center of Civil Law Studies, LSU Law Center. The project continues in process and the various conclusions drawn therefrom are tentative and are solely those of the author.

<sup>1</sup> La. Acts 1948, No. 335.

<sup>2</sup> YIANNOPOULOS, *Louisiana Civil Law System*, 34 (1977).

<sup>3</sup> YIANNOPOULOS, *Louisiana Civil Law System*, 13 (1971).

<sup>4</sup> YIANNOPOULOS, *Louisiana Civil Law System*, 36 (1977).

<sup>5</sup> *Id.*

The "consumer transaction," as that term is used herein, falls squarely within Titles III, IV, VII, IX and XII of Book III of the Louisiana Civil Code, and the general working hypothesis for the research undertaken was that the failure to have provided within those Titles a separate or dual standard by which to delineate *commercial* transactions from *consumer* transactions, now requires an examination of those Titles which addresses and emphasizes the role of consumer protection as an important ingredient in the broader picture of Civil Code revision. Though it is believed that such an examination of the Code would have been warranted in any event (as Professor Yiannopoulos' earlier quoted observations so obviously suggest), such an examination is clearly required by the evolving "nationalization" of consumer protection law by Congress and the Federal Trade Commission, described hereinbelow.

Following a brief recount of the history of the consumer phenomenon in the United States, three principal areas of inquiry were addressed:

- a) The effect of consumer-oriented federal statutes and substantive administrative or agency rules and regulations on the Civil Code of Louisiana, and the extent to which it is predictable that federal statutes and regulations will assume greater importance in the future.
- b) The relationship between the Civil Code and the *Louisiana Consumer Credit Law* of 1972<sup>6</sup> — how much of that legislation was necessary, in theory, *vis-a-vis* existing Civil Code provisions (principally those pertaining to obligations and sales); are the provisions of the 1972 statute compatible with the Civil Code; and should any part of that legislation be incorporated into a comprehensive revision of the Code.
- c) Should the Civil Code be revised as to more adequately reflect the change in societal views, values, expectations, etc. which underlie the consumer movement.

Regarding the effect of *Federal Consumer Protection Law*, an examination was made of, *inter alia*, the *Equal Credit Opportunity Act*, the *Fair Credit Billing Act*, the *Magnuson-Moss Warranty Disclaimer Law*, the cost-of-credit disclosure requirements of the *Truth in Lending Act*, and the federal "rescission of obligations" law contained in the *Truth in Lending Act* and in the Federal Trade Commission's "*Door-to-door Sales*" Rule. Special attention was focused on the growing role of the FTC as a substantive rule-maker in the consumer transaction area, and on the legislation and rules which are likely to come from the federal government in the near future.

With respect to the relationship between the Civil Code and the 1972 Louisiana consumer credit legislation, attention was focused first on the issue of the supplanting of that legislation by subsequent *Federal Consumer Protection Law*, both as presently enacted or promulgated, and as predictably to be so enacted or promulgated in the future. The main concern, however, was an

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<sup>6</sup> La. R.S. 9: 3510 — 3585 (1972).

examination of the relationship between the consumer protection potential of the existing Civil Code provisions and those enacted in the 1972 legislation.

Of concern in the third area of inquiry was the possible need for comprehensive revision of the Louisiana Civil Code — primarily in the area of Obligations and Sales presumably — to render the Code more responsive to changing societal values and desires. The recent experiences of other Civil Code jurisdictions will be important, though by no means of greater importance than as persuasive comparative materials. An obvious difficulty will be a determination of the policies which any proposed revision would seek to implement. Illustrative of the topical analysis in this (as yet incomplete) phase of the project: the relationship between lessor and residential lessee, contracts of adhesion, good faith, abuse of rights, contracts “contra bonos mores,” and redhibition. Interlaced within these topics are the following basic issues:

*Does the Louisiana Civil Code now sanction, or permit (however inadvertently) abuse of consumers, overreaching or unfairness by those who transact with consumers? Conversely, in what respects is the Code serving the public well?*

*Does civilian theory (as reflected in the Louisiana Civil Code) assume a parity of information, bargaining power, and access to recourse, which may not now exist in the consumer product and services market place?*

*In theory, can any body of laws predating 1960 be fairly expected to “cope” with the changing societal views on credit and the increasing availability of consumer durables through better production and marketing capabilities?*

*Are the individual's interests, expectations and sense of fairness (which presumably underlie the consumer movement) compatible with civilian theory of obligations, sales and personal responsibility?*

Again, Professor Yiannopoulos:

Attention was focused on Equity, not as a set of rules distinct from strict law, but as a built-in humanization of an integrated legal system.<sup>7</sup>

This thought has not escaped judicial notice:

There are apt to be conceptual difficulties in the marriage of the modern consumer protection policy and [the traditional Civil Code approach to such matters as] the redhibitory action, which was conceived in the context of a simpler market.<sup>8</sup>

*Does civilian tradition contain emphasis on individualism and freedom of contract that would be incompatible with any of the theories underlying the consumer movement?*

Exploration of the following possible areas of “adoptive” or positive Civil Code Revision will also be presented in the final research report.

<sup>7</sup> YIANNPOULOS, *Louisiana Civil Law System*, 21 (1971).

<sup>8</sup> *Smith v. Max Thieme Chevrolet Co.*, 315 So. 2d 82, 86 (La. App. 2nd Cir. (1975)).

1. A modernized standard of "habitability" of leased dwellings
2. Contracts of "adhesion" in Civil Code theory
3. The right of privacy
4. Warranties of quality of goods and services; disclaimers, minimum standards
5. The expectations of the consumer-buyer
6. Establishing a Civil Code delineation between "consumer" and "non-consumer" transactions for Obligations, Sales, and leases of dwellings, reflecting functional differences in kind.

## II. — CONSUMER PROTECTION IN LOUISIANA PRIOR TO 1968.

The profound changes in the consumer goods market place, particularly in the post-World War II era, may have outraced the ability of existing law in Louisiana (and elsewhere) to provide a meaningful ordering of the transactions taking place. Prior to about 1968, generally speaking, no laws on the federal or state level had direct application to changes in consumer transactions. In fact, pre-1968 federal consumer legislation taken as a whole, was primarily addressed to the protection of competition, though consumers did benefit indirectly from such legislation. Laws that were consumer oriented typically dealt with safety and health. The following listing emphasizes the point.

Table 1: SIGNIFICANT FEDERAL CONSUMER PROTECTION  
LEGISLATION ENACTED, 1872-1978<sup>9</sup>

- 1872 *Mail Fraud Act of 1872* to make it a federal crime to defraud through the use of mail.
- 1906 *Food and Drug Act of 1906* to regulate interstate commerce in misbranded and adulterated foods, drinks, and drugs.
- 1914 *Federal Trade Commission Act* to set up the Federal Trade Commission which, among other responsibilities, is to be concerned with "unfair methods of competition," such as deceptive advertising.
- 1938 *Federal Food, Drug and Cosmetic Act of 1938* to strengthen the Food and Drug Act of 1906 by extending coverage to cosmetics and devices; requiring predistribution clearance of safety on new drugs; providing for tolerance for unavoidable or required poisonous substances; and authorizing standards of identity, quality, and fill of container for foods.
- 1938 *Wheeler-Lea Amendment* to amend the *Federal Trade Commission Act* of 1914 by making it possible to prosecute for deceptive advertising or sales practices.
- 1939 *Wool Products Labeling Act* to provide for proper labeling of the kind and percentage of each type of wool.
- 1951 *Fur Products Labeling Act* to provide that all furs show the true name of the animal from which they were produced.
- 1953 *Flammable Fabrics Act* to prohibit the shipment in interstate commerce of any wearing apparel or material which could be ignited easily.

<sup>9</sup> Adapted from GAEDEKE & ETCHESON, *Consumerism: Viewpoint from Business, Government & the Public Interest*, San Francisco: Canfield Press, 1972.

- 1958 *Food Additives Amendment* to amend the *Food and Drug Act* by prohibiting use of new food additives until promoter establishes safety and FDA issues regulations specifying conditions of use.
- 1958 *Automobile Information Disclosure Act* to require automobile manufacturers to post the suggested retail price on all new passenger vehicles.
- 1959 *Textile Fiber Products Identification Act* to cover the labeling of most textile products not covered by the *Wool or Fur Products Labeling Acts*.
- 1960 *Federal Hazardous Substances Labeling Act* to require prominent warning labeling on hazardous household chemicals.
- 1960 *Color Additives Amendment* to amend the *Food and Drug Act*, allowing the FDA to establish by regulations the conditions of sale use for color additives used in foods, drugs, and cosmetics.
- 1962 *Kefauver-Harris Drug Amendments* to require drug manufacturers to file all new drugs with the Food and Drug Administration; to label all drugs by generic name; and to require pre-testing of drugs for safety and efficacy.
- 1965 *Drug Abuse Control Amendments* to amend the *Food and Drug Act* by allowing the FDA to require all legal handlers of controlled drugs to keep records of their supplies and sales; to seize illegal supplies of controlled drugs; to serve warrants; and to arrest violators.
- 1965 *Fair Packaging and Labeling Act* ("Truth-in-Packaging") to regulate the packaging and labeling of consumer goods and to provide that voluntary uniform packaging standards be established by industry.
- 1966 *National Traffic and Motor Vehicle Safety Act* to authorize the Department of Transportation to establish compulsory safety standards for new and used tires and automobiles.
- 1966 *Child Safety Act* to strengthen the *Hazardous Substances Labeling Act* of 1960 by preventing the marketing of potentially harmful toys and permitting the Food and Drug Administration to remove inherently dangerous products from the market.
- 1966 *Cigarette Labeling Act* to require cigarette manufacturers to label cigarettes: "Caution: cigarette smoking may be hazardous to your health."
- 1967 *Wholesome Meat Act* to require states to upgrade their meat inspection systems to federal standards and to clean up unsanitary meat plants.
- 1967 *National Commission on Product Safety Act* to establish a seven member commission to review household products that represent hazards to public health and safety and to file recommendations for necessary legislation.
- 1967 *Clinical Laboratories Act* to require all clinical laboratories operating in interstate commerce to be licensed by the federal government.
- 1968 *Consumer Credit Protection Act* ("Truth-in-Lending") to require full disclosure of the true cost of credit on consumer loans and credit buying; to regulate the garnishment of wages; to provide a right to rescind transactions involving lien interest in the principle dwelling.
- 1968 *Natural Gas Pipeline Safety Act* to authorize the Secretary of Transportation to develop minimum safety standards for the design, installation, operation and maintenance of gas pipeline transmission facilities.
- 1968 *Wholesome Poultry Products Act* to require states to develop inspection systems for poultry and poultry products which meet federal standards.
- 1968 *Hazardous Radiation Act* to require the Secretary of Health, Education and Welfare to establish performance standards for electronic products in order to limit or to prevent the emission of radiation.

- 1969 *Fire Research and Safety Act* to provide funds to collect, analyze and disseminate information on fire safety; to conduct fire prevention education programs; and to conduct projects to improve efficiency of fire-fighting.
- 1969 *Amended National Commission on Product Safety Act* to amend the National Commission on *Product Safety Act* in order to extend the life of the Commission so that it may complete its assigned tasks.
- 1969 *Child Protection and Toy Safety Act of 1969* to amend the *Federal Hazardous Substances Act* to protect children from toys and other articles intended for use by children which are hazardous due to the presence of electrical, mechanical, or thermal hazards, and for other purposes.
- 1970 *Regulation of Credit Cards*, to amend the *Consumer Credit Protection Act* to limit cardholder liability for unauthorized use of the card, and to regulate dissemination of credit cards.
- 1970 *Fair Credit Reporting Act*, to amend the *Consumer Credit Protection Act* to regulate the use and dissemination of consumer reports and consumer reporting agencies, and to protect the accuracy and privacy of consumer credit information.
- 1975 *Fair Credit Billing Act*, to amend *Consumer Credit Protection Act* to regulate handling of disputed billings by creditors, and to preserve cardholder defenses and claims.
- 1975 *Equal Credit Opportunity Act*, to amend the *Consumer Credit Protection Act* to prohibit discrimination in granting credit on the basis of sex, marital status, race, age and other categories.
- 1975 *Consumer Product Warranty Act*, to require labelling of written warranties as "limited" or "full"; to set minimum standards for written warranties; to regulate disclaimer of implied warranties.
- 1976 *Consumer Lease Disclosures Act*, to amend the *Consumer Credit Protection Act* to require certain disclosures to consumer lessees of personal property.
- 1977 *Fair Debt Collection Practices Act*, to regulate the activities of those who collect consumer indebtedness owed to or due a third-party.

The 1968 *Consumer Credit Protection Act* was thus the first federal statute to directly address a consumer problem outside of the public health and safety sphere. The bulk of the listed federal legislation since 1968 is a fall-out of the *Consumer Credit Protection Act*, including that pertaining to credit cards, credit reports, credit billing and credit opportunity.

The 1968 federal act was no doubt largely responsible for the renewed interest in consumer transactions at the state level in the early 1970's. The consumer products marketing revolution caught both Louisiana and the common-law states unprepared: prior to 1968, Louisiana's "consumer protection" laws consisted, in major part, of C.C. art. 2924,<sup>10</sup> a *Direct Vehicle Loan Company Act*<sup>11</sup> (requiring certain disclosures), a *Motor Vehicle Sales Finance Act*<sup>12</sup> (also requiring certain disclosures), and the *Louisiana Small Loans Law*<sup>13</sup> (permitting small loan rates to exceed the 8% limit of C.C. art. 2924). The common law states, in general, had similar legislation on the books, but one significant and

<sup>10</sup> A usury law.

<sup>11</sup> La. R.S. 9: 970-976 (1962).

<sup>12</sup> La. R.S. 6: 951-964 (1958).

<sup>13</sup> La. R.S. 6: 571-593 (1950) (now repealed).

fundamental difference in the common law system arguably permitted greater protection for the consumer than in Louisiana. That difference, of course, was, and is, the role of the judiciary. Thus, in the 1960's one finds courts in common law jurisdictions refusing to enforce an automobile warranty disclaimer provision as violative of public policy as a contract of adhesion,<sup>14</sup> refusing to enforce a sale on the basis that the seller knew there was no reasonable likelihood of repayment (and therefore an unconscionable transaction),<sup>15</sup> refusing to permit the assertion of holder in due course status,<sup>16</sup> and creating implied warranties of habitability in landlord-tenant transactions where none existed before,<sup>17</sup> to mention but a few examples.

In Louisiana during the period prior to 1968, judicial "creativity" (in the common law sense) in the consumer transaction setting was almost nil, the courts typically taking the view that changes in laws and the policies reflected thereby are a legislative concern. This attitude was prevalent among a probable majority of the common law courts as well.<sup>18</sup> It should not be assumed at this point that no provisions are contained in the Louisiana Civil Code which would have permitted a fair and valid "pro-consumer" interpretation.<sup>19</sup> Few such interpretations boldly appear in that era, however. Instead, the general Louisiana judicial input is best represented by the decisions in *Mayfield v. Nunn*<sup>20</sup> and *White System of New Orleans, Inc. v. Hall*.<sup>21</sup> In *Mayfield*, the Supreme Court of Louisiana declined to find usurious under Art. 2924, a promissory note which included a "bonus" to the lender of \$5,166.30; in *White System* the court declined to join a growing list of common law courts recognizing the "close-connexity" exception in holder in due course cases.<sup>22</sup>

<sup>14</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A. 2d 69 (N.J. 1960).

<sup>15</sup> *Cf. Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Cir. 1965); *Frostifresh Corp. v. Reynoso*, 274 N.Y.S. 2d 757 (D.C. N.Y. 1966); *rev'd on other grounds*, 281 N.Y.S. 2d 964 (Sup. Ct. 1967).

<sup>16</sup> See, e.g., *Unico v. Owen*, 232 A. 2d 405 (N.J. 1967).

<sup>17</sup> See, e.g., *Lemle v. Breeden*, 462 P. 2d 470 (Hawaii 1969); *Pines v. Persson*, 111 N.W. 2d 409 (Wis. 1961); *Mease v. Fox*, 200 N.W. 2d 791 (Iowa 1972). See generally, *annot.*, 40 A.L.R. 3d 637 (1971).

<sup>18</sup> In fact, if one were to exclude the high courts of the states of California, New York, New Jersey and Wisconsin alone, the pre-1968 judicial "creativity" of the common law states would quite closely match that of Louisiana — almost none.

<sup>19</sup> It will be demonstrated in the final research report that arts. 1819-27 (error of fact as to a principal cause), 1832 and 1847 (fraud), 1842 (error as to the thing), 2474 (seller's duty to explain the extent of his obligations), and 1958 (construction of ambiguities against the party who ought to have given an explanation), in particular, have been a significant source of consumer protection in Louisiana for many years, and that, in general, the Louisiana Civil Code, unfettered as it is by the premise of caveat emptor, has at all times had a far greater potential for consumer protection than the common law of the other 49 states.

<sup>20</sup> 121 So. 2d 65 (La. 1960).

<sup>21</sup> 53 So. 2d 227 (La. 1951).

<sup>22</sup> The court states, at p. 230 of the report:

Counsel for [defendant-makers of the promissory note] have cited several cases from other jurisdictions wherein the courts refuse to recognize that finance companies may be holders in due course in installment credit sales. The basis of those decisions is a feeling



Still, the Louisiana jurisprudence tended in this era to be creative within the confines of Civil Code obligations and sales where individual consumer-litigant's interests were involved.<sup>23</sup> The Louisiana legislature began to react in 1968; Table 2 lists significant consumer protective legislation enacted between 1968 and 1972.

Table 2: CONSUMER PROTECTION LEGISLATION  
IN LOUISIANA FROM 1968-1972

- LSA-R.S. 33:1236, 7501 (1968) — Municipalities and Police Juries given power to set up consumer education programs for the poor.
- LSA-R.A. 6:1081 *et seq* (1968) — Act Regulating loans and advances of credit by banks under revolving loan and credit card plans and providing that interest shall not exceed 1 1/2% per month or 18% per year simple interest on the average daily unpaid balance of the principal of the debt during the billing cycle or of the unpaid balance of the debt on approximately the same day of the billing cycle.
- LSA-R.S. 37:2581 (1970) — Act regulating licensing and bonding (\$10,500.00) of persons engaged in rendering financial planning and management services to individuals and receiving funds from them to distribute among their creditors.
- LSA-R.S. 9:2711 (1970) — A person who signs a purchase agreement with an "itinerant door-to-door salesman" which obligates the purchaser to accept merchandise or services from another for a consideration of over \$150.00 has a period of 3 days in which to withdraw his consent to the agreement.
- LSA-R.S. 9:3509 (1970) — Consumer credit act limiting sellers who extend credit to consumers in connection with the sale of goods and services under open-end credit accounts to a service or finance charge at a rate not to exceed 1 1/2% per month on the unpaid balance remaining 30 days after mailing the initial bill. (Private remedy).
- LSA-R.S. 51:461 (1970) — Unsolicited merchandise shall be deemed to be a gift and recipient may use as he sees fit, including throwing same away. If company continues to bill recipient, he can obtain an injunction against sender together with attorneys fees and costs. Also applies to clubs from which one purchases merchandise and which one notifies of termination of membership. (Private remedy).
- LSA-R.S. 51:911.21, *et seq.* (1970) — Mobile Homes — Act establishes a standards code for mobile homes approved by the United States of America Standards Institute for installation of plumbing, heating and electrical systems in mobile homes. Requires for mobile homes in the state to have a state seal and certification by the manufacturer or dealer that it meets the code with respect to plumbing, heating and electrical systems. The State Department of Commerce and Industry administers the act and may inspect places where mobile homes are manufactured or sold to determine if the act is being complied with. The penalty for violation of the act is first notice and 90 days to correct. If no correction \$500.00 fine.

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by the judiciary that, by using the Negotiable Instruments Law as a shield, the finance company is given an unfair advantage over the consumer buyer. There is undoubtedly some justification for this view, but steps to equalize their positions and regulate installment credit sales should be taken by the Legislature, and not by this court in view of the clear provisions of the Negotiable Instruments Law.

Cf. *Unico v. Owen*, 232 A. 2d 405 (N.J. 1967).

<sup>23</sup> Numerous Louisiana decisions appear which are explicitly sympathetic to the consumer of whom advantage has been taken by a more knowledgeable creditor, but such decisions do not announce broad new policies. See, e.g., *Carter v. Foreman*, 219 So. 2d 21 (La. App. 4th Cir. 1969); *Blum v. Marrero*, 346 So. 2d 356 (La. App. 4th Cir. 1977); *Smith v. Everett*, 291 So. 2d 835 (La. App. 4th Cir. 1974); *Chrysler Credit Corporation v. Henry*, 221 So. 2d 529 (La. App. 4th Cir. 1969).

LSA-R.S. 51:911 (1970) — Eyeglasses and Sunglasses. This act forbids the sale of glasses not fitted with heat treated glass lenses and of not less than two milimeter optical center thickness be capable of withstanding certain impacts. The penalties for violation is not less than \$100.00 nor more than \$500.00 for each violation.

On the federal level, consumer protection legislation begins with the enactment in 1968 of the *Consumer Credit Protection Act* ("CCPA"),<sup>24</sup> and, as is inferable from Table 3, much of the federal legislation since 1968 is directly or indirectly the result of the initial congressional leap into the consumer transaction area in that 1968 act.

Table 3: PRINCIPAL FEDERAL CONSUMER PROTECTION STATUTES  
AND SUBSTANTIVE RULES, 1968-1978

1. *Consumer Credit Protection Act of 1968* (as amended through 1978).
  - a) truth in leading [15 U.S.C. §§1601-1641 (1968)]
  - b) credit cards [15 U.S.C. §§1642-1645 (1970)]
  - c) credit advertising [15 U.S.C. §§1661-1665a (1968)]
  - d) credit billing [15 U.S.C. §§1666-1666j (1974)]
  - e) garnishment of wages [15 U.S.C. §§1671-77 (1968)]
  - f) credit reports and credit bureaus [15 U.S.C. §§1681-1681t (1971)]
  - g) equal credit opportunity [15 U.S.C. §§1691-91j (1975)]
  - h) consumer leases [15 U.S.C. §§1667-1667e (1977)]
  - i) debt collection practices [15 U.S.C. §§1692-1692o (1977)]
  - j) electronic fund transfers [15 U.S.C. §§ 1693-1693r (1978)]
2. *Consumer Product Warranty Act* (1975) [15 U.S.C. §§2301-2312]
3. *Consumer Product Safety Act* (1972) [15 U.S.C. §§2051-2081]
4. *FTC Door-to-door Sales Rule* [16 C.F.R. §429 (1976)]
5. *FTC Preservation of Consumer Claims and Defenses Rule* [16 C.F.R. §433 (1976)]
6. *FTC (proposed) Rule on Credit Practices* [16 C.F.R. §444]

### III. — TENTATIVE CONCLUSIONS AS TO THE EFFECT OF FEDERAL LAW AND SUBSTANTIVE RULES ON THE LOUISIANA CIVIL CODE.

Each of the laws and substantive rules listed in Table 3 was analyzed in detail with a view toward possible adverse affect on — perhaps even preemption of — Louisiana Civil Code provisions. It is at once apparent that the federal law has set up a double standard for commerce in the United States — one standard (primarily the Uniform Commercial Code) for transactions between merchants or between non-consumers, and one standard for transactions involving consumers. Thus, one may outline the various stages of the consumer transaction as shown in Table 4.

<sup>24</sup> 15 U.S.C. §1601-1691 (f) (1968).

Table 4: APPLICATION OF FEDERAL LAW TO THE  
VARIOUS STAGES OF A CONSUMER TRANSACTION

Stage	<i>Special federal consumer transaction requirements</i>
Advertising	<p>Regulation of unfair or deceptive acts or practices, such as FTC Guides as to deceptive pricing, bait advertising, deceptive advertising of guarantees, advertising of tires, shell homes, allowances; as to use of the word "free;" use of endorsements and testimonials; and as to fuel economy advertising for new automobiles; such as FTC Trade Regulation Rules as to use of the words, "leakproof," "guaranteed leakproof" in descriptions of dry cell batteries; as to health hazard advertising of cigarettes; as to retail food store advertising; and as to mail order merchandise.<sup>25</sup></p> <p>Regulation of packaging and labelling of consumer goods, and labelling of consumer warranties.<sup>26</sup></p>
Solicitation	<p>Requires certain disclosures in advertisements of credit terms.<sup>27</sup></p> <p>Prohibits unsolicited dissemination of credit cards.<sup>28</sup></p> <p>Regulates the solicitation of transactions consummated in a "door-to-door" sale,<sup>29</sup> or where a security interest is or may be taken in the consumer's residence.<sup>30</sup></p> <p>Prohibits sale of hazardous products.<sup>31</sup></p>
Negotiation, pre-consumation	<p>Requires detailed disclosure of the cost of credit and of the terms of the credit extension.<sup>32</sup> Requires disclosure of lease terms.<sup>33</sup> Requires clear disclosure of the terms of any written warranties on products costing over \$5.00.<sup>34</sup></p> <p>Prohibits or restricts (or proposes to do so<sup>35</sup>) use of certain contract provisions, such as relate to cardholder liability for unauthorized use of card;<sup>36</sup> waiver of defenses and claims clause;<sup>37</sup> confession of judgment;<sup>38</sup> waiver of federally mandated rights,<sup>39</sup> wage assignments;<sup>40</sup> consensual liens;<sup>41</sup> attorneys fee clauses.<sup>42</sup></p>

<sup>25</sup> See U.S.C. §45.

<sup>26</sup> See 15 U.S.C. §§2301-2312 (1975).

<sup>27</sup> 15 U.S.C. §§1661-1665a (1968).

<sup>28</sup> 15 U.S.C. §§1642-1645 (1970).

<sup>29</sup> See 16 C.F.R. §429.

<sup>30</sup> 15 U.S.C. §1635 (1968)

<sup>31</sup> 15 U.S.C. §§2051-2001 (1972).

<sup>32</sup> 15 U.S.C. §§1601-1641 (1968).

<sup>33</sup> 15 U.S.C. §§1667-1667e (1977).

<sup>34</sup> 15 U.S.C. §§2301-2312 (1975).

<sup>35</sup> The Federal Trade Commission has proposed certain far-reaching changes in consumer credit practices. See generally, *Symposium: FTC Credit Practices Rule*, 8 Conn. L. Rev. 450 (1976). The rule proposes 16 C.F.R. §444; See 40 Fed. Reg. 16347 (1975).

<sup>36</sup> 15 U.S.C. §§1642-1645 (1970).

<sup>37</sup> 16 C.F.R. §433 (FTC "Preservation of Consumer Credit Claims and Defenses" Rule).

<sup>38</sup> See 16 C.F.R. §444 (proposed; see n. 35, *supra*).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Time of Consummation	{	Prohibits discrimination in credit granting, <sup>43</sup> including prohibitions regarding areas of inquiry.
		Prohibits misrepresentation of right to cancel door-to-door sales. <sup>44</sup>
		Prohibits disclaimer of implied warranties and sets minimum standards for written warranties. <sup>45</sup>
		Requires labelling of written warranties and sets minimum standards in regard thereto. <sup>46</sup>
		Requires disclosures where credit is denied or charges therefor increased, in part due to an (adverse) credit report. <sup>47</sup>
		Regulates use of credit reports. <sup>48</sup>
		Would prohibit waiver of exempt property rights. <sup>49</sup>
		Dictates that certain notices or clauses be used by sellers or creditors, including: right to rescind under 15 U.S.C. §1635; right to cancel a door-to-door sales; <sup>50</sup> clause expressly making subsequent holders of consumer contracts subject to all claims and defenses of consumer. <sup>51</sup>
		Requires oral notice of right to cancel door-to-door sale. <sup>52</sup>
		Would limit goods which can be used to secure creditor's extension of credit. <sup>53</sup>
Post- Consummation	{	Would require disclosure to non-spouse co-signers and would make such co-signers "guarantors of collection" only. <sup>54</sup>
		Prohibits performance during rescission period under 15 U.S.C. §1635.
Creditor's Performance	{	Prohibits transfer of door-to-door sale contract to a third-party during cancellation period. <sup>55</sup>
		Regulates billing and posting procedures. <sup>56</sup>
		Regulates billing disputes. <sup>57</sup>
	{	Requires disclosures of cost of credit on open-account periodic billing. <sup>58</sup>

<sup>43</sup> 15 U.S.C. §§1691-91j (1975).

<sup>44</sup> 16 C.F.R. §429.

<sup>45</sup> 15 U.S.C. §§2301-2312 (1975).

<sup>46</sup> *Id.*

<sup>47</sup> 15 U.S.C. §§1681-1681t (1971).

<sup>48</sup> *Id.*

<sup>49</sup> See n. 35, *supra*.

<sup>50</sup> 16 C.F.R. §429.

<sup>51</sup> 16 C.F.R. §433.

<sup>52</sup> 16 C.F.R. §429.

<sup>53</sup> See n. 35, *supra*.

<sup>54</sup> *Id.*

<sup>55</sup> 16 C.F.R. §429.

<sup>56</sup> 15 U.S.C. §§1666-1666J (1974).

<sup>57</sup> *Id.*

<sup>58</sup> 15 U.S.C. §1637 (1968).

Post-Performance or default	{	Restricts wage garnishment. <sup>59</sup>
		Prohibits employee discharge related to wage garnishment. <sup>60</sup>
		Regulates practices of debt collection agencies. <sup>61</sup>
		Would regulate collection practices by creditors. <sup>62</sup>
		Preserves defenses and claims of borrowers, buyers and cardholders. <sup>63</sup>
		Regulates indiscriminate reporting of credit experiences with consumers. <sup>64</sup>
		Would require repossessing creditor to give defaulting consumer credit for the fair market value of the property repossessed, regardless of actual resale proceeds. <sup>65</sup>
		Would regulate imposition of late charges. <sup>66</sup>

If one assumes that the various recommendations of the National Commission on Consumer Finance<sup>67</sup> will be adopted by the Congress or the FTC (some already have been adopted),<sup>68</sup> the above list can be expanded as shown in Table 5.

Table 5: THE RECOMMENDATIONS OF THE NATIONAL  
COMMISSION ON CONSUMER FINANCE

1. restrict acceleration of maturity of any part of a consumer indebtedness to only those defaults specified in the contract.<sup>69</sup>
2. give consumer a 14 day right to "cure" a default in his agreement, i.e. default in a scheduled payment.<sup>70</sup>

<sup>59</sup> 15 U.S.C. §§1671-77 (1968).

<sup>60</sup> *Id.*

<sup>61</sup> 15 U.S.C. §§1692-16920 (1977).

<sup>62</sup> See n. 35, *supra*.

<sup>63</sup> 15 U.S.C. §1666i (1974).

<sup>64</sup> 15 U.S.C. §§1681-1681t (1971).

<sup>65</sup> See n. 35, *supra*.

<sup>66</sup> *Id.*

<sup>67</sup> The Commission (hereafter referred to as "NCCF") was established pursuant to Congressional mandate in conjunction with enactment of the *Consumer Credit Protection Act*, (15 U.S.C. §1601 et seq., (1970)). The NCCF's express duties were to study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally, and report its findings to Congress. See, *Report of the National Commission on Consumer Finance*, U.S. Gov't. Print. Office, Dec. 1972, §5200-00005, (hereafter referred to as "NCCF Report").

<sup>68</sup> A right to cancel door-to-door sales, and preservation of consumer claims and defenses, for example, were two of the NCCF recommendations. *NCCF Report* 23-44 (1972).

<sup>69</sup> *NCCF Report*, pp. xv, 24-25. Under UCC §1-208 a creditor must exercise an "at will" acceleration clause in good faith. That UCC section applies in Louisiana insofar as a negotiable instrument is concerned. La. R.S. 10: 1-208. No doubt La. C.C. art. 1901 could supply the same protection in any event. However, the burden of proof of lack of good faith is usually on the debtor; this the NCCF wants to change.

<sup>70</sup> *NCCF Report*, pp. xv, 24-25. This recommendation cannot truly be severed from that respecting the ubiquitous acceleration clause. No acceleration (for a specified default) could be made, and no other action taken in respect of a default unless the debtor is given 14 days prior written notice

3. require contracts that provide for payment of attorney's fees on default by consumer (if such is not completely prohibited) to further stipulate that if suit is instituted by creditor and court finds in favor of consumer, that creditor will be liable for payment of consumer's attorney's fee.<sup>71</sup>
4. restrict recovery of deficiency judgments upon repossession.<sup>72</sup>
5. prohibit use of a pre-judgment lien to divest the consumer of possession of personal property.<sup>73</sup>
6. would create a new classification of property exempt from levy, execution and sale.<sup>74</sup>
7. would prohibit communication by creditor of the existence of the debt to anyone other than the debtor, his attorney or his spouse, without his consent, prior to judgment.<sup>75</sup>
8. would require balloon payment provisions to be accompanied by a right to refinance the balloon payment.<sup>76</sup>
9. would allow prepayment in full without penalty.<sup>77</sup>
10. would require rebate of unearned interest upon default or upon prepayment in full, computed in accordance with the "rule of 78's", or the actuarial method.<sup>78</sup>
11. would prohibit the creditor or his representative from harassing the consumer regarding collection of the debt.<sup>79</sup>
12. prohibit creditor from commencing any legal action in an inconvenient venue.<sup>80</sup>
13. would amend the bankruptcy laws to permit courts to disallow claims of creditors stemming from "unconscionable" transactions.<sup>81</sup>

of the alleged default, his right to "cure" it, and a statement of the performance needed to cure it; for 14 days thereafter, the debtor could cure the alleged default, or challenge the allegation and avoid the acceleration. The NCCF recommends also that no more than three defaults could be cured during the contract term. The *NCCF's Survey of Consumer Credit* disclosed that banks allowed an average grace period of 12.2 days and finance companies 16.5 days, so that the NCCF's recommendation is merely the adoption of existing practice in the consumer credit industry.

<sup>71</sup> *NCCF Report*, pp. xv, 25-26. The amount of such a recovery by the consumer would be measured by the amount of time reasonably expended by his attorney and not by a percentage method. Since the *NCCF Survey* disclosed that the major reasons for default arise from circumstances beyond the debtor's control (see *NCCF Report*, exhibit 3-1, p. 43), attorneys fees clauses are not thought by the NCCF to be an inducement to payment. Still, the NCCF recommends that attorneys' fee clauses providing for fees up to 15% of the outstanding balance be permitted.

<sup>72</sup> The NCCF recommends that an opportunity to be heard be granted to the consumer so as to afford due process and that defaults in sales or loans involving original amounts financed or original prices of \$1765 or less, should put the creditor to an election as between repossession as full satisfaction of the debt, or suit for personal judgment on the debt without recourse to the collateral, but not both. *NCCF Report*, pp. xvi, 27-31.

<sup>73</sup> *NCCF Report*, pp. xvii, 38-39.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, at xviii, 39. Cf. La. R.S. 9: 3562.

<sup>76</sup> *Id.* La. R.S. 9: 3535 contains a similar right.

<sup>77</sup> *Id.*, at 40. La. R.S. 9: 3527 so provides.

<sup>78</sup> *Id.*, at 40. La. R.S. 9: 3528 so provides.

<sup>79</sup> *Id.*, at 41.

<sup>80</sup> *Id.*, at 41, 42. Creditors would be permitted to commence actions only in a location (1) where contract signed, (2) where debtor then resides, (3) where debtor resided when contract was made or (4) if there are "fixtures," where the goods are affixed to real property. A related recommendation has to do with "sewer service," the systematic process of attesting to service of notice of suit on a debt when in fact no such notice was served. The NCCF recommends that if a debtor has not received proper notice of the claim against him, any judgment entered upon his failure to appear and defend the claim shall be voided and the claim reopened upon the debtor's motion. *NCCF Report*, p. 41.

<sup>81</sup> *NCCF Report*, p. 42. Cf. U3C §6.111.

14. would require a hearing to establish the amount to which creditor is entitled prior to entry of a default judgment.<sup>82</sup>

Even if one were to accept the obvious proposition that the consumer transaction in Louisiana has been greatly restructured by federal law since 1968, the conclusion would nevertheless have to be drawn that the overall effect on the Louisiana Civil Code has been minimal. Few, if any, codal articles are directly inconsistent with the new federal statutes and substantive rules, and relatively few codal articles are significantly affected by the federalization of consumer transactions, though various articles are now cast in a slightly different light. For the most part, the “new look” of consumer law fits quite nicely into the existing Louisiana Civil Code structure. The latter conclusion is brought about in part because the code has never attempted to deal specifically with consumer transactions and hence its broad statements of principle in the areas of obligations, sales and undertakings are able to absorb the specific requirements and prohibitions of federal law without undue damage to the overall fabric.

Partly responsible also for the apparent accommodation between the code and federal law is the approach typically taken by Congress and the FTC, whereby the creditor is required, upon penalty of violation of federal law, to incorporate the specific federal consumer protective idea into the *agreement* he makes with the consumer or its supporting documents. For example, if the FTC had simply decreed that claims and defenses of the consumer could be raised against third-party assignees notwithstanding that the contract stipulated the contrary, a reading of La. C.C. art. 1901<sup>83</sup> might well require at least a mental asterisk; but by requiring that the seller insert into the contract a stipulation that, in essence, the parties *agree* that all such claims and defenses can be raised by the consumer, such becomes the agreement of the parties (however disgruntled the seller is at the prospect) and La. C.C. art. 1901 absorbs it in a matter of fact way. Thus, the right of rescission under §1635 of the *Truth in Lending Act*, and the right of cancellation of door-to-door sales contracts or offers to buy, become matters of *consent* under the Civil Code. The seller or secured creditor, by complying with federal law, has *agreed* that the buyer or borrower may cancel the transaction within three business days.<sup>84</sup> Articles 1797 through 1802 could also absorb the creditor’s “proposition” within the existing code fabric. Thus, the consent of the buyer in the door-to-door sale or in a §1635 case would not “be evinced in some manner that [could] cause it to be understood” under art. 1797 as being a valid consent until the stipulated three-day period has expired. Likewise, what is proposed by the seller and accepted by the buyer expressly calls for a period of re-evaluation of the advisability of the transaction by the consumer, quite consistent with La. C.C. arts. 1798, 1799, with a “final” acceptance by silence

<sup>82</sup> *NCCF Report*, p. 43. Various other recommendations are also made. A summary of all the recommendations of the NCCF may be found at pp. xv — xxvi of the *Report*.

<sup>83</sup> La. C.C. art. 1901 states: “Agreements legally entered into have the effect of laws on these who have formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith.”

<sup>84</sup> See La. C.C. arts. 2021, 2022, 2024, 2026, 2028.

or inaction within the three days, consistent with La. C.C. arts. 1800-1804, 1809, 1812-1814, and 1817.

Alternatively, and perhaps more abstractly, the federal rights of cancellation or rescission create a new category of “causes acknowledged by [in this case federal] law”<sup>85</sup> for the revocation of contracts or offers.

In a similar vein, the federal disclosure requirements of *Truth in Lending*, consumer leasing and product warranties are consistent with the art. 2474 requirement that “The seller is bound to explain himself clearly respecting the extent of his obligations,” with federal law adding only what a seller in good faith under La. C.C. arts. 1901, 1957, 1958 and 1819-23 should do anyway — explain the extent of the *consumer’s* obligations in understandable terminology so that error is avoided and the consumer fairly bound under art. 1901. Particularly is this a matter required by good faith in cases involving a seller-prepared contract of adhesion. Since the lender or lessor occupy *vis-à-vis* the borrower or lessee, a relatively similar status in the Civil Code,<sup>86</sup> the art. 2474 result can be obtained in his case by the combination of La. C.C. arts. 1901 and 1957, 1958. Further, since under La. C.C. art. 1903 “obligation of contracts extends.... to everything that, by law.... is considered as incidental....,” the very same analysis can be applied to the requirements of federal law that the consumer be given notice of his rights. Such notice is required by §1635 and the FTC Door-to-door Sales Rule, the *Fair Credit Reporting Act*, the *Equal Credit Opportunity Act*, among others.

The restrictions on false or deceptive advertisements also fall nicely into the seller’s or lender’s duty to explain the extent of their own obligations and to avoid error — not to mention fraud.

Federal law often simply leads to agreements by creditors that, while dictated by federal law, are nonetheless perfectly binding under art. 1901. Of this nature are the requirements as to legends on consumer contracts, provisions with respect to credit card liability typically found in credit card agreements, as well as the rescindable or cancellable transactions. In short, federally required legends, notices, and the like, have reversed some aspects of the contract of adhesion approach previously in control, by which the beginning of the problems now sought to be cured was aided and abetted. For instance, if the negotiable character of consumer contracts had historically been truly a matter of give-and-take bargaining, with perhaps one price or interest rate for negotiable evidences of indebtedness, and a slightly higher price or rate for nonnegotiable writings, the strong case made by the NCCF and the FTC for abolishment of holder in due course status in consumer transactions would not have been so easily made.

Conversely, the prohibitive aspects of the federal law can be viewed as a new feature of La. C.C. art. 1895’s phrase “forbidden by law,” whether or not art.

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<sup>85</sup> See n. 83, *supra*.

<sup>86</sup> See, e.g., *Murrell v. Lion*, 30 La. Ann. 255 (1878); *Boh v. Pan-American Petroleum Corporation*, 37 F. Supp. 785 (E.D. La. 1951); *Hauser v. Ladd & Burnett*, 8 La. App. 220 (Orl. 1928).



1901 or the articles on consent, and error, are called into play. Certainly the quoted phrase ought to be broad enough to encompass federal statutes or rules, particularly in view of the fact that the code was obviously adopted against a background of a state-federal dual law system. Of course, art. 1895, by its nature, operates as a built-in restriction on the art. 1901 freedom of contract idea.

Of further interest is the relationship between federal law and the "contrary to moral conduct or to public order" idea of art. 1895. While significant Louisiana cases are few, the "morality" aspect has in general been limited to contracts concerning gambling,<sup>87</sup> concubines,<sup>88</sup> prostitution,<sup>89</sup> and vague pronouncements as to contracts "contrary to public policy."<sup>90</sup> By contrast, the matter of usury, for example, was considered a *moral* issue in early legal history,<sup>91</sup> while the relationship between "public order" and predatory creditor practices was noted by the Kerner Commission in its investigation of the 1965 riots in Detroit and elsewhere.<sup>92</sup>

It doesn't require great mental gymnastics to conclude, first, that the result which the bulk of the federal statutes and rules discussed above seek could have been achieved by appropriate judicial interpretation<sup>93</sup> of, *inter alia*, La. C.C. arts. 1895, 1901;<sup>94</sup> second, that since the federal statutes and rules are "laws" within the meaning of art. 1895, and operate primarily on the validity of consent, no real "damage" has been done to the Civil Code, since art. 1901's "freedom of contract" notion has always been qualified by arts. 1893 and 1895 and, of course, by the "consent" articles; third, that while Louisiana courts historically have not over-utilized either "good faith" under art. 1901 or "contra bonos mores" under art. 1895 as consumer protective devices, they have equated "public order" with "public policy" and have refused on that basis to enforce contracts of a distinctly consumer orientation.<sup>95</sup>

<sup>87</sup> *Russo v. Mula*, 49 So. 2d 622 (La. App. 1st Cir. 1950); *Martin v. Seabaugh*, 54 So. 935 (1911).

<sup>88</sup> *Stringer v. Mathis*, 7 So. 229 (1839); *Cole v. Cole*, 7 Mart., N.S., 414 (1829).

<sup>89</sup> *Lyman v. Townsend*, 24 La. Ann. 625 (1872), is an example, but most cases involved, not the enforcement of a contract for the procurement of the services of a prostitute, but whether prostitution can be raised to avoid payment on any otherwise valid contract of sale.

<sup>90</sup> *Bergeron v. Mumphrey*, 38 So. 2d 411 (La. App. Or. Cir. 1949); *McMahon v. Hardin*, 121 So. 678 (La. App. Or. Cir. 1929); *McGowan v. City of New Orleans*, 43 So. 40 (La. 1907); *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 6 So. 888 (La. 1889); *Hardin v. Wolf & Cerf.*, 29 La. Ann. 333 (1877); *U.S. Leasing Corp. v. Keiler*, 290 So. 2d 427 (La. App. 4th Cir. 1974); *Mid-Continent Refrigerator Co. v. Williams*, 285 So. 2d 247 (La. App. 3rd Cir. 1973); *U.S. Treas. Dept. v. Garrett*, 360 F. Supp. 232 (M.D., La. 1973); *aff'd* 493 F. 2d 908, (5th Cir. 1974).

<sup>91</sup> CAZALAS, "Usury Law in Louisiana", 14 *Loyola L. Rev.* 301 (1967).

<sup>92</sup> *Report of the National Advisory Commission on Civil Disorders* (U.S. Gov't Print. Office, Supt. Doc. # Pr. 36.8: C49/R29 found a definite correlation between consumer abuse and a "revenge" aspect to the civil disorders of the 1960's. See pp. 139-141 of the Report and pp. 43-45, 125-131 of the *Supplemental Studies for the National Advisory Commission on Civil Disorders*, U.S. Gov't Print. Office, Supt. Doc. # Pr. 36.8: C49/St9.

<sup>93</sup> It is perhaps a combination of legislative and judicial inactivity that has led to federal intrusion.

<sup>94</sup> The "good faith" aspect, in particular.

<sup>95</sup> In *McGowan v. City of New Orleans*, *supra* n. 90, the assignment of the unearned part of salary by a public officer was held void as against public policy. Cf. *U.S. Treasury Dept. v. Garrett*,

Insofar as interstate commerce is affected, *Federal Consumer Protection Law* can be seen as setting the standard of morality in the marketplace, a standard of national “public policy.” Code revision, as a process in Louisiana has long been cognative of the desirability of and the need for accomodation to a national (uniform) commercial law. Now, accomodation is required for what Congress obviously feels is a desirable and necessary national (uniform) law as to certain aspects of consumer transactions. That accomodation will cause no strain on the Louisiana Civil Code.

The relationship between the federal law and specific codal articles is set forth in Table 6.

Table 6: RELATIONSHIP BETWEEN  
FEDERAL LAW AND SPECIFIC CODAL ARTICLES

<i>Act</i>	<i>Source</i>	<i>Consistent With:</i>	<i>Possible Affect On:</i>	<i>Inconsistent With:</i>
Truth in Lending	15 U.S.C. §1601-41	1819,1820,1824,1901 2474,1881,1832,1946 1945,1957,1958,1965 1966	1948 1947 1953	1947
Rescindable Real Estate Transactions	15 U.S.C. §1635	1799,1801,1802,1804 1805,1809,1817,1849 1760.1,1903,2460,2471 2024,2026,2045,2765 1963,1965,1966,1895	1901,1803 2456,2549 1881,2027 2047,2034 2035,2041 2758,2759 2772,2776	
Violation of Disclosure Requirements I. a §1635 Case.	15 U.S.C. §§1640,1635	2474,1821,1822,1832 1849,1963,1958	1825	1823,1826
Forfeiture and the §1640 Civil Penalty	15 U.S.C. §§1666(e) 1666a; §1640	2117,2118,2119,2125	2120,2125	1933,1934 2127
Credit Card Liability Limitation	15 U.S.C. §1643	1901,1903,1963,1764 1760,1761	1901	1933,1934
Credit Card Dissemination	15 U.S.C. §1642		1901	1933,1934
Act Advertising Restriction	15 U.S.C. §§1661-1665a	2474,1958,1832,1965 1821,2547,1841,1845 1847,1849		

Table 6: CONTINUED

<i>Act</i>	<i>Source</i>	<i>Consistent With:</i>	<i>Possible Affect On:</i>	<i>Inconsistent With:</i>
<i>Fair Credit Billing-Forced Resolution of Disputes</i>	<i>15 U.S.C. §§1666- 1666j</i>	1799,1903,1913,1903	1901,1911 1912	
<i>Prohibition Of Waiver Of Defenses and Claims By Credit Card Holder</i>	<i>15 U.S.C. §1666c</i>	1965,1895,1764,1760 2031,2026,1799,1761	1901	
<i>Wage Garnish- ment</i>	<i>15 U.S.C. §§1671-77</i>	1895,2031	1901,2749	2747
<i>Fair Credit Reporting</i>	<i>15 U.S.C. §§1681- 1681-t</i>	2315	1901,2315	
<i>Equal Credit Opportunity</i>	<i>15 U.S.C. §§1691- 1691d</i>	Abuse of Right	1901	
<i>Consumer Leases</i>	<i>15 U.S.C. §§1667- 1667e</i>	1895,1903,2474,1946 1948,1957,1958,1965 1966	1901	
<i>Debt Collection Practices Act</i>	<i>15 U.S.C. §§</i>	2315, Abuse of Right		
<i>Cons. Prod. War. Act- Explain; Label; Disclaimer</i>	<i>15 U.S.C. §§2051- 2081</i>	2520	2545,2521, 1901	
<i>FTC Pres. of Cons. Claims &amp; Defenses Rule</i>	<i>16 C.F.R. §433</i>	1760,1761,1764,1799 1765,1895,2031,2026	1901	
<i>FTC Door-To- Door Sales Rule</i>	<i>16 C.F.R. §429</i>	1895,1760.1,2045,1799 1801,1802,1804,1805, 1809,1817,1849,2460, 2031,2471,2024,2026	1901	

#### IV. — THE RELATIONSHIP BETWEEN THE 1972 LOUISIANA CONSUMER CREDIT LAW AND THE LOUISIANA CIVIL CODE.

The *Louisiana Consumer Credit Law*<sup>96</sup> was enacted in 1972 amidst a wave of nation-wide consumer credit reform. Against the background discussed earlier herein in part II, the 1972 Act was an attempt to provide comprehensive treatment of the problems peculiar to consumer credit, borrowing heavily from the text of Uniform Consumer Credit Code ("U3C"). The major provisions of the 1972 law appear in descriptive form in Table 7.

Table 7: THE SIGNIFICANT PROVISIONS OF THE  
1972 LOUISIANA CONSUMER CREDIT LAW

- a) sets maximum loan finance charges, closed-end credit sale "service" or finance charges, revolving charge account "service" or finance charges, and loan finance charges on lender credit card accounts;<sup>97</sup>
- b) sets maximum delinquency (late payment or default) and deferral charges for precomputed consumer credit transactions;<sup>98</sup>
- c) sets maximum charges for consumer credit sales evidenced by a negotiable promissory note which is assigned to a licensed lender<sup>99</sup> within 35 days of the transaction;<sup>100</sup>
- d) sets maximum charges after maturity for all precomputed consumer credit transactions;<sup>101</sup>
- e) provides a right to prepay in full the unpaid balance of a consumer credit transaction at any time, and receive thereupon a rebate of unearned (precomputed) loan finance or credit services charges, the rebate computation method known as the "Rule of 78's" being expressly approved;<sup>102</sup>
- f) provides a right to a rebate of unearned (precomputed) loan finance or credit service charges where the transaction is accelerated upon default;<sup>103</sup>
- g) places limits and prohibitions on certain agreements and practices, including:
  1. limits attorneys' fees which the consumer "agrees" to pay in the event of his default and the referral to an attorney for collection to not in excess of 25% of unpaid debt after default;<sup>104</sup>
  2. prohibits the dividing of a transaction into multiple agreements to obtain a higher rate of charge on the graduated rate structures;<sup>105</sup>

*supra* n. 90. In *Hardin v. Wolf*, *supra* n. 90, it was held that the homestead law embodied the public policy of the state and rights thereunder could not be waived by contract. A provision in a lease whereby lessor could, on lessee's default, sue for future rental payments after taking possession of the leased property was held unenforceable as contrary to public policy in *U.S. Leasing Corp. v. Keiler*, and in *Mid-Continent Refrigerator Co. v. Williams*, both *supra*, n. 90.

<sup>96</sup> La. R.S. 9: 3510-3585 (1972).

<sup>97</sup> La. R.S. 9: 3519, 3520, 2523, 2524.

<sup>98</sup> La. R.S. 9: 3525, 3526.

<sup>99</sup> See La. R.S. 9: 3516.

<sup>100</sup> La. R.S. 9: 3521.

<sup>101</sup> La. R.S. 9: 3522.

<sup>102</sup> La. R.S. 9: 3527, 2528. A prepayment charge of up to \$25 is permitted.

<sup>103</sup> La. R.S. 9: 3529. The rebate is required when the obligation is accelerated and suit thereon is filed.

<sup>104</sup> La. R.S. 9: 3530. And, presumably, after crediting the "default-acceleration" rebate, if any.

<sup>105</sup> La. R.S. 9: 3531.

3. declares that any promissory note or similar evidence of indebtedness taken in connection with a "home solicitation sale"<sup>106</sup> shall be deemed nonnegotiable;<sup>107</sup>
  4. requires that where any scheduled payment is more than twice as large as the average of earlier scheduled payments, the consumer has the right to refinance the amount of that "balloon" payment, at the time it is due, without penalty, and on terms no less favorable to him than the terms of the original transaction;<sup>108</sup>
  5. declares that if a consumer is induced to enter into a credit transaction by a "referral sales scheme,"<sup>109</sup> that agreement is unenforceable by the extender of credit and may be rescinded by the consumer, who in addition may retain delivered goods or the benefit of services performed thereunder without obligation to pay for them;<sup>110</sup>
  6. provides the consumer the right to cancel a home solicitation sale,<sup>111</sup> and prescribes a form for the offer or agreement and statement of right to cancel;<sup>112</sup> provides for the post-cancellation relationship between consumer and seller;<sup>113</sup>
  7. sets maximum rates for, and amounts of, credit life, accident and health insurance,<sup>114</sup> and property insurance,<sup>115</sup> granting the consumer the option of obtaining his own coverage;<sup>116</sup>
  8. places limits on rates and provides for rebates of unearned, prepaid credit insurance premiums; limits certain other practices;<sup>117</sup>
  9. permits a court to refuse to enforce a consumer credit agreement or clause thereof, or to limit the application thereof, if the court finds as a matter of law that the agreement or any clause thereof was unconscionable when made;<sup>118</sup>
  10. prohibits indiscriminate contacting by creditors of persons outside the consumer-debtor's immediate family, regarding the debt;<sup>119</sup>
  11. prohibits indiscriminate dissemination of specific credit information;<sup>120</sup>
  12. prohibits discrimination in credit granting on the basis of race, color, religion, national origin, sex or marital status;<sup>121</sup>
- h) provides that a woman's earnings during marriage are responsible for the satisfaction of debts incurred by her either before or during marriage;<sup>122</sup>

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<sup>106</sup> La. R.S. 9: 3516 (17).

<sup>107</sup> La. R.S. 9: 3532B.

<sup>108</sup> La. R.S. 9: 3535.

<sup>109</sup> Defined in La. R.S. 9: 3536 as giving or offering to give "a rebate or discount or otherwise pay or offer to pay value to the customer as an inducement for a sale or lease in consideration of his giving to the extender of credit the names of prospective purchasers or lessees, or otherwise aiding the extender of credit in making a sale or lease to another person, if the earning of the rebate, discount or other value is contingent upon the occurrence of an event subsequent to the time the consumer agrees to buy or lease."

<sup>110</sup> La. R.S. 9: 3536.

<sup>111</sup> Defined in La. R.S. 9: 3516 (17). La. R.S. 9: 3538 (as amended through the 1978 Reg. Sess.).

<sup>112</sup> La. R.S. 9: 3539.

<sup>113</sup> La. R.S. 9: 3540, 3541.

<sup>114</sup> La. R.S. 9: 3542.

<sup>115</sup> La. R.S. 9: 3543.

<sup>116</sup> La. R.S. 9: 3544.

<sup>117</sup> La. R.S. 9: 3545-3549.

<sup>118</sup> La. R.S. 9: 3551. Defined in La. R.S. 9: 3516 (29).

<sup>119</sup> La. R.S. 9: 3562.

<sup>120</sup> La. R.S. 9: 3571.

<sup>121</sup> La. R.S. 9: 3581-358.

<sup>122</sup> La. R.S. 9: 3584.

- i) provides that any married woman may purchase property, and incur obligation therefor, and may encumber the property purchased with a mortgage, loan, pledge, or other security device, for the payment thereof;<sup>123</sup>
- j) provides for private and administrative enforcement of the provisions of the act;<sup>124</sup> and for licensing of lenders;<sup>125</sup>

Subsequent federal laws and/or substantive agency rules preempt or negate all or portions of the credit law listed in Table 7 as items *g*-3,<sup>126</sup> *g*-6,<sup>127</sup> *g*-11<sup>128</sup> and *g*-12.<sup>129</sup> Laws and/or rules now contemplated by Congress or the FTC, or recommended by the NCCF<sup>130</sup> would similarly affect items *e*,<sup>131</sup> *g*-1, *g*-10<sup>132</sup> and *g*-9.<sup>133</sup>

The conclusions which follow presume that a Louisiana court would interpret a given Civil Code article in a way which would accomplish a pro-consumer result. It will be demonstrated in the final report on research that the Louisiana courts have, on numerous occasions and in a variety of circumstances, done so; to the extent that Louisiana courts have not and are not doing so, that fact itself becomes an argument in favor of the necessity and desirability of the 1972 act, even where certain provisions were perhaps unnecessary.<sup>134</sup>

<sup>123</sup> La. R.S. 9: 3585. For analysis and discussion of the features of the 1972 Act, see generally, "Symposium: Louisiana's New Consumer Protection Legislation", 34 La. L. Rev. 597 (1974) (hereinafter referred to as "Symposium").

<sup>124</sup> La. R.S. 9: 3552, 3554, 3555.

<sup>125</sup> La. R.S. 9: 3557-3561.

<sup>126</sup> Declaring an instrument "nonnegotiable" achieves the same result as the FTC's *Preservation of Claims and Defenses Rule*: a third-party purchaser of the instrument must take subject to and be accountable for all defenses and claims which the consumer-maker may have.

<sup>127</sup> The FTC's Door-to-door Sales Rule, by its terms, leaves the Louisiana enactment undisturbed, except to the extent that the two are inconsistent and any such inconsistency is not in the consumer's favor. Act No. 373, 1978 Regular Session, provides that compliance with the FTC Rule shall constitute compliance with La. R.S. 9: 3539 (D); see also, *Symposium*, 34 La. L. Rev. 597 (1974).

<sup>128</sup> The Louisiana provision and the federal *Fair Credit Reporting Act* appear to be consistent.

<sup>129</sup> The Louisiana provision would seem to add no more than a local layer of enforcement.

<sup>130</sup> See Tables 4, 5, *supra*.

<sup>131</sup> Louisiana's prepayment rule allows a percentage prepayment penalty; the Federal rule may not.

<sup>132</sup> The FTC (proposed) *Rule* would perhaps operate as the *Door-to-door Rule* — supervening only that part of La. R.S. 9: 3562 inconsistent with the *Rule*. The FTC (proposed) *Rule* as to attorneys' fees and collection costs (Item G-1 Table 7) would, under one alternative, place a blanket prohibition on collection costs and attorneys' fee clauses; such costs would have to be "spread" among all customers.

<sup>133</sup> A NCCF proposal would allow a bankruptcy court to disallow claims of creditors, stemming from "unconscionable" transaction. *NCCF Report* p. 42.

<sup>134</sup> There is a certain psychological effect to be perceived in analysing the adoption in the common law states of UCC §2-302. Under that section, courts may refuse to enforce agreements or clauses found to be "unconscionable." Yet, courts previously inclined favorably toward the consumer have seen no appreciable increase in "pro-consumer" decisions; courts which were just as concerned, but inclined to the conservative view that the matter was one "for the legislature," saw in §2-302 that the legislature had "spoken."

*Rate Ceilings, Late Payments Charges, and Ancillary Matters.*

Article 2924 is Louisiana's usury law, and its 8% limit is similar to that of the usury laws of the common law states. That rate of charge did not historically provide a sufficient profit inducement for the loan industry to make small loans, and Louisiana at an early date amended art. 2924 to permit the charging of discounted capitalized interest which exceeded the 8% limit.<sup>135</sup> The usury law was held inapplicable to a bona fide credit sale of property,<sup>136</sup> and this position approximated that of the common law states then entertaining the fiction that a "time-price" charge was not "interest" within the meaning of common law usury statutes. The time-price exception to usury statutes began to fade rapidly in the common law states during the 1960's and early 1970's<sup>137</sup> causing attention to once again focus on the regulation of the credit sale finance charge in Louisiana.<sup>138</sup> That attention quickly disclosed a hodge-podge of not necessarily related and/or integrated statutes governing the rate of charge on loans not exceeding \$300,<sup>139</sup> on sales and loans secured by motor vehicles,<sup>140</sup> and finance charges on credit card accounts.<sup>141</sup> The 1972 act provides a comprehensive set of rate ceilings on consumer loans and sales, and on revolving accounts, including credit card accounts.<sup>142</sup> Article 2924 was amended in 1972 to exempt "consumer credit transactions" as defined in the *Consumer Credit Law*, though no particular reason appears why La. C.C. art. 2924 itself could not have been rewritten so as to set up the same rate ceiling as the credit law.

Prior to the 1972 act, delinquency and deferral charges were largely unregulated except as a matter of La. C.C. arts. 2924 and 1935, and La. R.S. 9:3501;<sup>143</sup> to that extent, an integrated and comprehensive approach was called for, and the provisions of the 1972 act in that regard were a step in the right direction.<sup>144</sup> Again, no particular reason appears why arts. 2924 and 1935 could not have been re-written, though both the rate ceilings and the delinquency-deferral provisions of the 1972 act do tend to be more specific than is the typical civil code provision.

<sup>135</sup> See *Mayfield v. Nunn*, 121 So. 2d 65 (La. 1960); CAZALAS, *Usury Law in Louisiana*, 14 Loy. L. Rev. 301 (1967). Justice Tate is not necessarily convinced that the line of cases applying the Mayfield approach have correctly interpreted art. 2924; the issue is whether "discount" applies to the lender as well as to the third-party taker. See *Budget Plan of Baton Rouge, Inc. v. Talbert*, 276 So. 2d 297 (La. 1973) (conc. op. Tate).

<sup>136</sup> *Mills v. Crocker*, 9 La. Ann. 334 (1854).

<sup>137</sup> See, e.g., *State v. J.C. Penney Co.*, 179 N.W. 2d 641 (Wis. 1970); *Lloyd v. Gutsell*, 124 N.W. 2d 198 (Neb. 1963); *Sloan v. Sears, Roebuck & Co.*, 308 S.W. 2d 802 (Ark. 1957); *State v. Younker Bros.*, 210 N.W. 2d 550 (Iowa 1973).

<sup>138</sup> One writer had advanced the idea in 1964 that sales finance charges were "interest" under art. 2924. Comment, 24 La. L. Rev. 822, 842-49 (1964).

<sup>139</sup> La. R.S. 6: 571-93 (1950).

<sup>140</sup> La. R.S. 6: 951-64 (1958); 6: 970-76 (1962).

<sup>141</sup> La. R.S. 9: 3509 (1970).

<sup>142</sup> See generally, *Symposium*, 34 La. L. Rev. 597-608 (1974).

<sup>143</sup> See *Thrifty Funds of Baton Rouge, Inc. v. Jones*, 274 So. 2d 150 (La. 1973).

<sup>144</sup> See generally, *Symposium*, 34 La. L. Rev. 597-608 (1974).

The provisions of the act with respect to maximum charges where the seller utilizes a promissory note to be assigned to a lender licensed under the act,<sup>145</sup> and maximum charges after maturity<sup>146</sup> are ancillary to the rate structure of the act, and require no discussion.<sup>147</sup>

*The Right to Prepay in Full the Unpaid Balance of a Precomputed Consumer Credit Transaction, at Any Time, and to Receive Upon Such Prepayment, or Upon Default, a Rebate or Remission of Unearned Interest.*

In Louisiana, prior to the 1972 act, if the obligee exercised a contract right to accelerate the maturity of a precomputed installment obligation, the obligor was entitled to a rebate or remission of the unearned interest,<sup>148</sup> but where the obligor accelerated (prepaid) the obligation he was entitled to no such rebate.<sup>149</sup> The Louisiana Supreme Court had remarked that this rule is "settled law."<sup>150</sup> The theory underlying the rule is intertwined with the notion of capitalized interest and contractual acceleration rights of creditors;<sup>151</sup> however, there seems no compelling reason why a rewritten art. 2924 could not cover this matter.

<sup>145</sup> La. R.S. 9: 3521; see generally, *Symposium*, 34 *La. L. Rev.* 597, 604 (1974).

<sup>146</sup> La. R.S. 9: 3522.

<sup>147</sup> An interesting problem of statutory construction has been created by the FTC's *Preservation of Consumer Claims and Defenses Rule* (16 C.F.R. §433; See Table 3, *supra*) as to §§3521-3532(A). The section refers to a "negotiable promissory note," which at the time of enactment meant La. R.S. 9: 1 (after January 1, 1975, the reference would be to La. R.S. 10: 3-104), there being no definition in the credit law of that term. However, the FTC's Rule requires sellers of consumer goods and services to place on all consumer contracts certain specified language which arguably renders such contracts non-negotiable. See BOYLE, "Preservation of Claims and Defenses Under The Texas Business and Commerce Code and Under The Texas Consumer Credit Code," 8 *St. Mary's L. J.* 679, 683-687, 691-693 (1977); Comment, 31 *S.W.L.J.* 1097 (1977). Although this writer takes the view that such required FTC language merely reflects an agreement (inspired by the need to comply with the FTC Act of 1914, of course) between the parties to vary the effect of UCC §3-305 (La. R.S. 10: 3-305) pursuant to §1-102 (3), the argument is admittedly esoteric. Accordingly, it may well be that La. R.S. 9: 3521, 3532(A) have been rendered ambiguous. On the other hand, more striking statutory ambiguities have not caused judicial pause in Louisiana. See *Jordan v. LeBlanc and Broussard Ford, Inc.*, 332 So. 2d 534 (La. App. 3rd Cir. 1976).

<sup>148</sup> See, e.g., *Budget Plan of Baton Rouge, Inc. v. Talbert*, 276 So. 2d 297 (La. 1973); *Williams' Heirs v. Douglass*, 17 So. 805 (La. 1895); *Unity Plan Finance Co. v. Green*, 155 So. 900 (La. 1934).

<sup>149</sup> See, e.g., *Talbert*, and *Unity Plan*, *id.*; *Thrift Funds*, *supra*, n. 143.

<sup>150</sup> *Thrift Funds*, *supra*, n. 143.

<sup>151</sup> In the *Unity Plan* case, *supra*, n. 148 is found the following passage.

[T]he stipulation in the contract, that a failure to pay any one note [or installment] at maturity would mature all remaining notes, was a lawful stipulation, even though the interest on all of the notes for the whole term of the loan was retained by the lender as discount. Hence.... the borrower could not, by his own default or breach of the contract [i.e. early payment], render the contract usurious; but.... the lender, who availed himself of the right to demand payment of the debt before the expiration of the term for which the interest had been paid, was obliged to remit the unearned interest.

Justice Tate had indicated in *Talbert*, *supra* n. 148 a willingness to reconsider this rule so obviously so obviously lacking in fairness:

The.... borrower contends quite forcefully that there is an illogic, from the point of view of determining usury, in permitting retention of unearned interest on the basis of whether, technically, the borrower or the lender requests acceleration. The present is an instance of the difficulties of making such determinations in the gray area of an unlettered



*Agreements by Consumer to Pay Court Costs and Attorneys Fees.*

Although it seems beyond question that the costs of enforcing an obligation (of creditor or of consumer), including court costs and attorneys' fees, and are a foreseeable, consequential damage resulting from the breach of a contract or of a warranty,<sup>152</sup> it has long been the general Anglo-American rule that attorneys' fees and court costs are not recoverable as an item of damages unless they are specially stipulated for in the agreement, or are otherwise authorized by law,<sup>153</sup> or elements of bad faith or fraud appear.<sup>154</sup>

The 1972 act expressly permits such contractual provisions, but places a percentage ceiling on them. Obviously, this results in contracts valid under art. 1901 which are, in essence, contracts of adhesion whereby attorneys' fees (up to the ceiling permitted) are recoverable by the creditor upon breach by the consumer, but are never recoverable by the consumer (no similar clause in his favor ever being found in the contract) absent bad faith, fraud, or knowledge of, or reason to know of, redhibitory defects by sellers.<sup>155</sup>

Arts. 1934, 2545 and others could well have been re-written to accomplish this result, but fairness would seem to dictate equality of treatment here: if either party breaches his obligation, reasonable attorneys fees should be recoverable, not merely as an accompaniment of bad faith or fraud, but as a matter of foreseeable expense of realizing the respective objects of the contract. Realistically, such an amendment would lend itself well to the inclination to perform obligations — hardly a policy the Code ought to avoid. Alternatively, frivolous appeals or defenses, as well as law suits themselves, could be more closely scrutinized by Louisiana courts for possible application of traditional notions of bad faith and fraud, rather than focusing merely on bad faith in the breach itself.

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borrower's simple attempt to obtain a new cash advance, with his "request" for acceleration being measured in terms dictated by a sophisticated finance-lending technique run by skilled lenders. Nevertheless,.... I am not prepared as yet to say that this illogical and difficult-to-administer test is not the most socially practical. 276 So. 2d at 308 (conc. op. Tate, J.).

<sup>152</sup> Cf. La. C.C. arts 1934, 2545; see, e.g., *Sokol v. Bob McKinnon Chevrolet, Inc.*, 307 So. 2d 404 (La. App. 4th Cir. 1975); *Palmer v. Anchor Marine, Inc.*, 331 So. 2d 114 (La. App. 1st Cir. 1976); *Weaver v. Fleetwood Homes of Mississippi, Inc.*, 327 So. 2d 172 (La. App. 3d Cir. 1976).

<sup>153</sup> See, e.g., *Blackshear v. Landey*, 46 So. 2d 688 (La. App. Orl. Cir. 1950); *Neveu v. Voorhies*, 14 La. Ann. 738 (1859); *Nassau Realty Co., Inc. v. Brown*, 332 So. 2d 206 (La. 1976); Note, 25 Drake L. Rev. 717 (1976).

<sup>154</sup> Cf. art. 1934.2; see, e.g., *Raney v. Gillen*, 31 So. 2d 495 (La. App. 2nd Cir. 1947); *Givens v. Chandler*, 143 So. 79 (La. App. 1st Cir. 1932); *Smallpage v. Wagner & Wagner*, 84 So. 2d 863 (La. App. Orl. Cir. 1956). Wrongful execution can result in awards of attorneys' fees also; see, e.g., *Alfano v. Franed*, 105 So. 598 (La. 1925); *Grant v. Anderson*, 331 So. 2d 862 (La. App. 2nd Cir. 1976). Where malice is shown, exemplary damages are a possibility. Cf. *Chatman v. Phillips*, 102 So. 519 (La. 1925).

<sup>155</sup> See note 132, *supra*.

*Prohibiting the Use of Multiple Agreements and Regulation of "Balloon" Payment Stipulations.*

Because the rate ceilings established by the *Credit Law* are graduated, two loans of \$800, for example, will yield more interest than one loan of \$1600.<sup>156</sup> Consequently, § 3531 of the credit law, preventing that result, is necessary. If the rate structure were to be incorporated into art. 2924, a similar protective provision would be called for,<sup>157</sup> unless art. 1901's good faith requirement is extended to the contract *formation* process.

Where the consumer has, by agreement, obligated himself to make a scheduled payment which is more than twice as large as the average of other scheduled payments, but for the credit law, art. 1901, with its notion of "freedom of contract" would threaten to engrave that commitment in stone.<sup>158</sup> Of course, the notion of "good faith" under art. 1901 might theoretically be applied to achieve the same result in some cases,<sup>159</sup> but would not seem to apply as currently written.

*Unenforceability of Contracts Tainted by "Referral Sales" Schemes; Rescission Thereof by the Purchaser With Right to Retain Goods Delivered Without Obligation.*

The referral sales scheme is in essence a fraudulent, and deceptive, act or practice which is a violation of the *FTC Act* of 1914, and of the Louisiana deceptive practices act.<sup>160</sup> As numerous of the provisions of the credit law, the referral sales provisions were adapted from the Uniform Consumer Credit Code.<sup>161</sup> Unfortunately, the premise under which the U3C in part proceeds is the historic difficulties and inadequacies of common law fraud and deceit as consumer remedies. That this premise does not equally apply in Louisiana would give reason enough to pause in the legislative "borrowing" of such statutes: the problem is compounded in the case of the referral sales provisions of the credit law by the fact that, as with many home solicitation sales, the major culprit is the home

<sup>156</sup> The loan of \$800 can be made at a 36% per annum rate; that of \$1600 at a of 36% on pre firts \$800, and 27% on pre remaining \$800 rate. R.S. 9: 3519 (A) (1).

<sup>157</sup> Cf. *Flower v. Millaudon*, 19 La. 185 (La. 1841) (agreement to apply legal rate to sum larger than that really due, held usurious).

<sup>158</sup> An example of a valid balloon payment agreement is seen in *Time Finance Company v. Louis*, 152 So. 2d 248 (La. App. 4th Cir. 1963). The agreement, for the purchase of an automobile, called for 23 monthly installments of \$75, with a final balloon payment of \$1975. Defendant made all 23 payments of \$75, plus a 24th of \$75, for a total of \$1800, but could not pay the baloon payment. The Fourth Circuit affirmed a judgment for the mortgagee.

<sup>159</sup> If, in *Louis, id.*, it could be shown that there was no reasonable expectation that Louis could pay the balloon payment, the court perhaps could have forced a de facto refinancing of the balance of \$1900 by refusing to enforce the contract as written. Cf. *Boisseau v. Vallon & Jordano, Inc.*, 141 So. 38 (La. 1932).

<sup>160</sup> La. R.S. 51: 1401-1418 (1972).

<sup>161</sup> See, e.g., U3C §§2.411 (referral sales); 2.402 (multiple agreements); 2.405, 3.402 (balloon payments); 2.501-.505 (home solicitation sales); 2.413, 3.404 (attorneys' fees); 2.203, 2.204, 3.203, 3.204 (deferred and delinquency charges); 2.209, 2.210, 3.209, 2.210 (prepayment and rebate).

improvement contractor, who does not "sell" in Louisiana in the same sense as the pots and pans vendor.<sup>162</sup>

Referral sales schemes, at least as defined in the credit law, are representations or ploys that are made or engaged in bad faith, and are in any event fraudulent. This distasteful scheme, which is usually employed by those who prey on the most gullible among us, could easily be made a matter of Louisiana Civil Code articles pertaining to fraud,<sup>163</sup> error,<sup>164</sup> cause which is *contra bonos mores*, essential conditions, and no doubt others. In fact, the entire scope of the referral sales statute may well be cumulative.<sup>165</sup>

Obviously, there is possible preemption by the FTC's Door-to-door Sales Rule whenever a referral sale is also a "door-to-door" sale under the FTC Rule. Because the referral sale protection for Louisiana buyers is quite good, no federal preemption in fact is likely to.

#### *Right to Cancel "Home Solicitation Sales."*

Federal preemption by the FTC's Door-to-door Sales Rule is a possibility in the case of home solicitation sales, but even within the limited confines prescribed

<sup>162</sup> A "referral sale" under §3536 involves a giving or the offer to give a rebate or discount or otherwise give value to the buyer as an inducement for a sale or lease in consideration of the buyer's giving to the seller the names of prospective purchasers or lessees, if the earning of the discount or value is contingent upon the occurrence of an event subsequent to the time of the agreement, e.g., the seller actually following up on the list of prospective buyers; or actually using buyer's newly sided or roofed home as a "demonstration" or "showplace" home. Section 3536 is keyed to a "consumer loan, a consumer credit sale, or a consumer lease....," each of which transactions are also defined. A "consumer credit sale" is defined by §3516 (10) to be the "sale of a thing.... in which a credit service charge is charged and the purchaser is permitted to defer.... the purchase price.... in two or more installments...., the thing being purchased primarily for personal, family, household or agricultural purposes.... by a natural person...." The concept of "Thing" is found in §3516 (28): as used in the credit law "thing" is "as defined by law and includes.... goods, or services." Thus, an exterminator, utilizing a referral sale scheme, would be covered by §3536, even though he is not a "seller" for purposes of C.C. art. 2520.

<sup>163</sup> C.C. arts. 1832, 1847, 1848, and 2547 all seem obviously applicable to the referral sale scheme. See *Fidelity Credit Company v. Bradford*, 177 So. 2d 635 (La. App. 3d Cir. 1965); *Plan Investments of Shreveport, Inc. v. Heflin*, 286 So. 2d 511 (La. App. 2nd Cir. 1973).

<sup>164</sup> It perhaps is analetically more difficult to apply the concept of error to the matter of the referral sales scheme, since the principal cause may not as readily be viewed as the obtaining of a thing which will, in essence, pay for itself. Consider, for example, the case of *Claiborne Butane Company, Inc. v. Hackler*, 138 So. 2d 234 (La. App. 2nd Cir. 1962), in which a merchant's allegation that an ice making machine had been represented as a thing which would pay for itself did not, even if the allegation be accepted as true, constitute a defense of error as to a principal cause. The court does concede that had the representation been incorporated into the agreement as a stipulated condition, a different result could obtain. It would seem that if such an unstipulated profit motive does not avail a merchant, it will not avail the consumer whose agreement is not likely to so stipulate. Implicit in the *Hackler* opinion also is the element of "puffing," i.e., a salesman is expected to say his mercantile product will "pay for itself." That, however, is readily distinguishable from the representation that actual "commissions" will be paid to the buyer; and, it is probably true that most of the consumer sales induced by a referral sales scheme would not have taken place in the face of a more honest sales pitch.

<sup>165</sup> Permitting the victimized buyer to rescind would be cumulative, though giving him the right to retain delivered goods would perhaps be novel to the Civil Code.

by federal preemption, the cancellation of one narrow category of sale (or contract) involving the entrance into the home by the uninvited seller could no doubt be accomplished by appropriate amendment to the Louisiana Civil Code. Article 1901 would be a problem, but at least in the non-home improvement contracts area, sales falling within the current definition of a "home solicitation sale" could be viewed as a contract in which, by law, or by implication, or (where federal law is complied with) by express contract terms, the buyer has reserved to himself the right of "view and trial" under La. C.C. art. 2460. This approach won't work as easily with home improvement contracts, but there is no reason that the Louisiana Civil Code cannot either provide a three-day cooling-off period for any "home solicitation contract," or similarly amend both the sales and the letting out of labor provisions of the Code.

*Limitations on Creditor-Debtor and Creditor-Third-Party Contracts Regarding the Debt.*

Section 3562 of 1972 Act prohibits the creditor<sup>166</sup> from contacting "any person.... who is not living, residing or present in the household of the debtor, regarding the debtor's obligation to pay a debt."<sup>167</sup> This much of the law is not new. Louisiana has long been one of the leading jurisdictions in recognizing creditor harrassment and the indiscriminate dissemination of information about the debt as acts giving rise to rights of action for damages.<sup>168</sup> Invasion of privacy,<sup>169</sup> intentional infliction of mental suffering<sup>170</sup> and "unreasonable coercion"<sup>171</sup> have been put forth in the courts as theories underlying this La. C.C. art. 2315 action. Abuse of right could perhaps be an applicable notion as well.<sup>172</sup>

Section 3562, without placing any limits on the art. 2315 action,<sup>173</sup> does introduce some order into this tort area, by stating what types of contacts a creditor may make, to whom, and in what circumstances.<sup>174</sup> Section 3562 also provides a relatively simple method by which the debtor in default can demand

<sup>166</sup> Section 3562 is expressly not limited in application to a creditor in a "consumer credit transaction."

<sup>167</sup> Exceptions are made for contacts to other extenders of credit and credit reporting agencies.

<sup>168</sup> See, e.g., *Pack v. Wise*, 155 So. 2d 909 (La. App. 3d Cir. 1963) (employer contact led to debtor's discharge; held, unreasonable coercion, tortious invasion of privacy); *Quina v. Robert's*, 16 So. 2d 558 (La. App. Orl. Cir. 1944 (same)); *Boudreaux v. Allstate Finance Corporation*, 217 So. 2d 439 (La. App. 1st Cir. 1968) (creditor repeatedly called debtor's neighbors, requesting that they call debtors to their phone, debtors having no phone of their own, making defamatory and insulting remarks about debtors to their neighbors; such calls to neighbors were frequent and deliberately placed at inconvenient hours such as at night; that creditor personally called upon debtors at their home, using loud and abusive language in the yard); see generally, Hersbergen, *Representing the Creditor: A Guide to the New Ground Rules of Extending and Collecting Credit*, 21 Drake L. Rev. 281, 421-427 (1972); Symposium, 34 La. L. Rev. 597, 625-628 (1974).

<sup>169</sup> See *Pack v. Wise*, *id.*

<sup>170</sup> See *Boudreaux* case *supra*, n. 168.

<sup>171</sup> See *Pack v. Wise*, *supra*, n. 168.

<sup>172</sup> See CUETO-RUA, *Abuse of Rights*, 35 La. L. Rev. 965 (1975).

<sup>173</sup> La. R.S. 9: 3562 (5).

<sup>174</sup> The idea being that art. 2315 would still be pertinent anytime the creditor "overdoes" it.

that the creditor cease further contacts with him regarding the debt, which demand has the effect of thereafter limiting the creditor to one non-threatening mail contact per month and a maximum of four personal contacts<sup>175</sup> for the purpose of settling the obligation. Even though the approach is somewhat specific, no reason appears why such innovations could not have been incorporated into the civil code, utilizing, of course, the civilian technique of examples. The area may become heavily overlaid by federal law, however.<sup>176</sup>

*Prohibition Against Indiscriminate Dissemination of Specific Credit Information; Prohibition Against Discrimination In Credit Granting.*

Both of these areas are also heavily burdened with the matching federal overlay, and preemption possibilities makes it difficult to meaningfully analyze either statute, beyond the observation that neither adds very much to the state of the (primarily federal) law, and neither would seem to fit the traditional civil code categories under Conventional Obligations or Sales. What each does add to Louisiana law is the presence of (or possibility of) administrative rule-making and enforcement.

*Application of Woman's Earning During Marriage to Satisfaction of Her Debts, Enabling Married Woman to Incur Obligations and Encumber Property.*

This topic is also somewhat laden with the federal preemption potential from the *Equal Credit Opportunity Act* — Regulation B.<sup>177</sup> Additionally the matter is the subject of recent Legislative action.<sup>178</sup>

*"Unconscionable" Contracts.*

Perhaps the one feature of the 1972 *Consumer Credit Law* that does not, in the obvious sense, fit into the Civil Code framework is §3551,<sup>179</sup> pursuant to which a court is expressly empowered to refuse to enforce, or to selectively enforce, a contract shown to have been "unconscionable" when entered into. The origins of principle are traceable to the "inherent" power of a common law court to utilize broad notions of "equity" and to give the evolution of the common law a "nudge" from time to time. All but one of the 51 American jurisdictions<sup>180</sup> enacting the UCC have the principle in statutory form, and, of course, all would have it as a matter of common law doctrine.

<sup>175</sup> The meaning of "personal" is not entirely clear; e.g., is a letter a "personal" contact?

<sup>176</sup> The *Fair Debt Collection Practices Act* now applies and the FTC's proposed Credit Practices Rule may come to bear on collection practices as well.

<sup>177</sup> 16 C.F.R. §202.

<sup>178</sup> Act No. 627, 1978 Reg. Sess.

<sup>179</sup> La. R.S. 9: 3551 (1972). The section states, in part:

With respect to a consumer credit transaction, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at any time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result....

<sup>180</sup> The Virgin Islands and the District of Columbia enacted the UCC in its entirety, along with the 49 common law United States. Louisiana has adopted certain provisions of the UCC, but has not adopted those pertaining to sales or secured transactions.

“Unconscionability” is an amorphous concept. In it can be seen the ideas of good faith, public policy, avoidance of unjust enrichment and fraud, relief from high pressure selling, fine print, one-sided and “adhesion” contracts, and others. Its importance dictated a detailed analysis, particularly since none of the above-mentioned “ideas” are at all foreign to the Louisiana Civil Code, as interpreted by the judiciary.

Although §3551 does contain an express qualification on the principle announced,<sup>181</sup> and the act does attempt a definition<sup>182</sup> of “unconscionable,” the notion that a clause or stipulation, or indeed, the entire contract between the parties can be unenforceable as an “unconscionable” bargain was taken by the Louisiana legislature from §5.108<sup>183</sup> of the U3C, the latter uniform law having itself “borrowed” the doctrine from §2-302<sup>184</sup> of the UCC. When the Louisiana legislature has in the past borrowed and made its own a statute of another

<sup>181</sup> La. R.S. 9: 3551 continues:

provided, however for the purposes of this chapter, an agreement, clause, charge or practice expressly permitted by this chapter or any other law or regulation of this state or of the United States or subdivision of either, or an agreement, clause, charge or practice necessarily implied as being permitted by this chapter or any other law or regulation of this state or the United States or any subdivision of either is not unconscionable.

<sup>182</sup> La. R.S. 9: 3516 (29):

“Unconscionable.” A contract or clause is unconscionable when at the time the contract is entered into it is so onerous, oppressive or one-sided that a reasonable man would not have freely given his consent to the contract or clause thereof in question: provided, however, for the purposes of this chapter, an agreement, clause, charge or practice expressly permitted by this chapter or any other law or regulation of this state or of the United States or subdivision of either, or an arrangement, clause, charge or practice necessarily implied as being permitted by this chapter or any other law or regulation of this state or the United States or any subdivision of either is not unconscionable.

<sup>183</sup> Section 5.108 [Unconscionability] (1968 official text):

(1) With respect to a consumer credit sale, consumer lease, or consumer loan, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made the court may refuse to enforce the agreement, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.

U3C section 6.111 (1968 official text) empowers the administrator of the consumer credit law to bring a civil action to restrain a creditor from engaging in a course of unconscionable conduct. Cf. La. R.S. 9: 3554, 3555.

<sup>184</sup> Section 2-302. Unconscionable contract or clause (1972 official text):

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract of any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Among the many commentaries on the doctrine of unconscionability are: ELLINGHAUS, “In defense of Unconscionability,” 78 *Yale L. J.* 757 (1969), LEFF, “Unconscionability and The Code — The Emperor’s New Clause,” 115 *U. of Pa. L. Rev.* 485 (1967); SPANOGLE, “Analyzing Unconscionability

jurisdiction,<sup>185</sup> it has been an accepted rule of statutory construction that the decisions of the courts in such other jurisdictions be taken as at least “persuasive” aids on questions of meaning and intent.<sup>186</sup> In the particular case of UCC §2-302 and U3C §5.108, those sections also are accompanied by Official Comments of the Uniform Law Institute Draftsmen of each section, which should also be viewed as reliable aids in statutory construction.<sup>187</sup>

Approximately 105 reported decisions were found in which the issue of unconscionability under UCC §2-302 was raised.<sup>188</sup> Of that number, some 85 cases contain at least a judicial pronouncement as to the unconscionability of a given contract or term.<sup>189</sup> The statistical breakdown of those cases is shown in Table 8.

Table 8: STATISTICAL OUTLINE OF UCC §2-302 CASES

Total cases analyzed:	85
consumer .....	23
commercial .....	49
other .....	13
Commercial cases finding unconscionability .....	15
Commercial cases finding against unconscionability .....	34
Consumer cases finding unconscionability .....	15
Consumer cases finding no unconscionability .....	8

Because the express purpose of the analysis of unconscionability cases is to determine the nature of §3551 of the consumer credit law, it might seem that the cases in which unconscionability arose in a commercial setting are not germane.

Problems,” 117 *U. of Pa. L. Rev.* 931 (1969); MURRAY, “Unconscionability: Unconscionability,” 31 *Pitt. L. Rev.* 1 (1969); Comment, 9 *Bost. C. Ind. & Com. L. Rev.* 367 (1968); Comment, 58 *Dick. L. Rev.* 161 (1954); Comment, 45 *Iowa L. Rev.* 843 (1960); Comment, 114 *U. of Pa. L. Rev.* 998 (1966); Comment, 45 *Va. L. Rev.* 583 (1959).

<sup>185</sup> In the case of §3551, the legislature in effect borrowed from fifty other UCC jurisdictions (California omitted §2-302, but the District of Columbia and the Virgin Island did adopt it), and from six U3C jurisdictions (Oklahoma, Colorado, Idaho, Indiana, Utah, and Wyoming). Since 1972, the states of Wisconsin, South Carolina, Iowa, Kansas and Maine have adopted the U3C.

<sup>186</sup> See, e.g., *Standard Oil Company v. Collector of Revenue*, 27 So. 2d 268 (La. 1946); *Moresi v. Burleigh*, 127 So. 624 (La. 1930); *Glover v. Abney*, 106 So. 735 (La. 1925); *Kay v. Carter*, 150 So. 2d 27 (La. 1963). Cf. *Watson v. Feibel* 71 So. 585 (La. 1916); *Suc. of Lissa*, 3 So. 2d 534 (La. 1941); *Suc. of Hedden*, 140 So. 851 (La. App. Orl. 1932); *State v. Baddock*, 170 So. 2d 5 (La. App. 1st Cir. 1964); *Broussard v. State Farm Mut. Auto. Ins. Co.*, 188 So. 2d 111 (La. App. 3d Cir. 1966); *State v. Macaluso*, 106 So. 2d 455 (La. 1958).

<sup>187</sup> Where the issue has arisen, the UCC decisions treat the Comments as persuasive and reliable aids in construing the statutory language. See, e.g., *In re Augustin Bros. Co.*, 460 F. 2d 376 (8 th Cir. 1972); *Warren’s Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 171 S.E. 2d 643 (Ga. App. 1969); *Burchett v. Allied Concord Financial Corp.*, 396 P. 2d 186 (N.M. 1964); *In re Bristol Associates, Inc.*, 505 F. 2d 1056 (3rd Cir. 1974).

<sup>188</sup> The quoted figure is “approximate” because the issue is not always named as such, and is not always the ground upon which the court ultimately decides the case.

<sup>189</sup> Many decisions discuss the issue of unconscionability while making no finding. *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Civ. 1965), is an example.

But only by the contrast between the consumer and commercial cases can the key factors of unconscionability be isolated and evaluated. Generally speaking, however, it is rare to find a contract or clause between two knowledgeable merchants or mercantile entities being denied enforcement on the basis of unconscionability. And, as Table 9 discloses, the particular clause or provision typically alleged to be unconscionable in a commercial transaction does differ from that in a consumer transaction.

Table 9:  
TERMS ALLEGED TO BE UNCONSCIONABLE IN 69 COMMERCIAL AND CONSUMER CASES.

Terms <sup>190</sup>	Commercial		Consumer	
	Uncon- scionable	Not Uncon- scionable	Uncon- scionable	Not Uncon- scionable
termination of the contract	1	5	1	—
limitation of liability, damages, remedies, indemnification clauses, allocation of risks	—	—	—	—
liquidated damages; forfeiture	5	14	4	—
waiver of claims, defenses, or notice	4	1	1	—
confession of judgment	1	1	2	1
disclaimer of implied warranty	1	—	—	1
broker's commission	1	5	1	—
attorney's fees	—	—	—	1
price	—	1	—	—
payment provisions	—	3	6	2
guaranty and misc.	—	1	—	3
	1	3	—	—
totals	15	34	15	8

Several general observations can be made from Tables 8 and 9. For one thing, consumer cases by no means dominate the reported decisions; and given that the UCC has been in effect in several jurisdictions for about fifteen years, and in effect in forty-or-so jurisdictions for at least eight years, §2-302 has not led to a flood of litigation.<sup>191</sup> Table 9, however, is more descriptive than substantive.

<sup>190</sup> Several cases involve two or more disputed clauses. See, e.g., *Bakal v. Burroughs Corporation*, 343 N.Y.S. 2d 541 (sup. Ct. 1972) (disclaimer of implied warranties and confession of judgment); *Jefferson Credit Corporation v. Marciano*, 302 N.Y.S. 2d 390 (N.Y. Civ. Ct., N.Y.Co., 1969) (waiver of claims and defenses, and waiver of implied warranties); *Dean v. Universal C.I.T. Credit Corporation*, 275 A. 2d 154 (N.J. Super. 1971) (waiver of claims and defenses and assumption by buyer of risk of loss of personal property in automobile upon repossession). Consumers can no longer be required to waive claims and defenses as against third parties, under the FTC Preservation of Consumer Claims and Defenses Rule. 16 C.F.R. §433. The phrase "confession of judgment" carries the common law connotation.

<sup>191</sup> By comparison, the §2-302 cases are greatly overshadowed numerically by the §2-316 disclaimer of implied warranty cases. Additionally, it should be noted that only one reported case has been found under the U3C §5.108, now in effect in about a dozen jurisdictions. See *Barnes v. Helfenbein* 548 P. 2d 1014 (Okla. 1976) (no unconscionability found).



The majority of the reported decisions under UCC §2-302 involve *commercial* transactions, but a disproportionate number of the cases in which unconscionability has been found involved consumer transactions. It may well be that the widespread adoption in the 1960's of §2-302's above-the-board grant of power simply coincided with a growing awareness on the part of the judiciary of the harsh affect on consumers of a marketplace governed by a *caveat emptor* philosophy. Still, there are only about 100 cases in which §2-302 has come up, and only 30 or so decisions finding unconscionability, of which 15 involved consumer transactions — about one consumer transaction a year<sup>192</sup> since 1965.

Many decisions take pains to point out the reason the doctrine is applied in favor of the consumer. Thus, in *Ellsworth Dobbs, Inc. v. Johnson*,<sup>193</sup> the New Hampshire Supreme Court states:

Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possession it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable.\*\*\* The perimeter of public policy is an ever increasing one. Although courts continue to recognize that persons should not be unnecessarily restricted in their freedom to contract, there is an increasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way.<sup>194</sup>

New York decisions have become somewhat aggressive in their general disdain for the *caveat emptor* notion:

[W]e have reached the point where "let the buyer beware" is a poor business philosophy for a social order allegedly based upon man's respect for this fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will ultimately lose freedom\*\*\*.<sup>195</sup>

and:

The term "caveat emptor" has been eroded by the [Uniform Commercial] Code. No longer can a seller hide behind it when acting in an unconscionable manner. The advent of the [UCC] and its application by the courts has redefined the idiom "caveat emptor" to include "let the seller beware," especially in consumer related transactions.<sup>196</sup>

The key to the erosion of *caveat emptor* is expressed in yet another New York case, *Jefferson Credit Corporation v. Marciano*:<sup>197</sup> "The application of the doctrine of *caveat emptor* presupposes some parity or equality between the

<sup>192</sup> The doctrine may be having a greater impact in unreported decisions of courts of original jurisdiction.

<sup>193</sup> 236 A. 2d 843 (N.H. 1967).

<sup>194</sup> *Id.*, at 857.

<sup>195</sup> *State v. ITM, Inc.*, 275 N.Y.S. 2d 303, 320 (Sup. Ct. 1966).

<sup>196</sup> *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S. 2d 268 (N.Y.C. Civ. Ct. 1973).

<sup>197</sup> 302 N.Y.S. 2d 390 (N.Y.C. Civ. Ct. 1969).

bargaining parties.”<sup>198</sup> Parity of bargaining power leads to the presumption that the terms of a contract, however harsh or one-sided, were *consented* to. A disparity of bargaining power permits, but does not compel, the presumption that the terms were not consented to. Unconscionability then, amounts to a defect of consent.

There is no formula that can with precision be applied by the court in determining whether, as a matter of law, the contract or one or more of its clauses should not be enforced, as being unconscionable. Yet, a number of factors seem, from an analysis of the over one hundred §2-302 cases, relevant, and can be applied in order to predict with a fair degree of reliability the outcome of a given case. The discussion which follows presents certain conclusions which have been drawn by the writer from an analysis of eighty-five cases decided under UCC §2-302, as statistically outlined in Table 8. The nature of the particular clause in litigation has very little to do with the question of law faced by the court. Rather, the predictability of the ultimate ruling is gleaned from a series of fact issues, as shown in Table 10.

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<sup>198</sup> *Id.*, at 393.

Table 10

Issues	YES				NO				UNDETERMINED Inferentially "Yes"				UNDETERMINED: or inapplicable			
	Not Uncons.		Unc.		Not. Uncons.		Uncons.		Not Uncons.		Uncons.		Not Uncons.		Uncons.	
	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.
1. Was buyer <sup>199</sup> a knowledgeable and sophisticated person with relative parity of bargaining power?	17	1	4	—	—	2	5	9	15	1	4	5	2	4	2	—
2. Did buyer initiate contact with seller, or did the parties find each other as a result of normal marketplace mechanisms?	20	3	4	8	—	—	1	5	12	4	5	—	2	1	5	1
3. Was seller willing to negotiate on the term, or did he in fact negotiate on other terms; were negotiations deliberate, detailed and/or lengthy?	5	1	—	—	2	1	5	6	20	1	—	—	7	5	10	8
4. Did buyer have legal or otherwise experienced and knowledgeable representation, or were the terms comparably clear, concise, and simple or was buyer familiar with the contents of the clause or term in question?	8	2	—	—	—	1	5	11	19	1	1	1	7	4	9	2
5. Have these parties, or at least other suppliers with whom buyer has dealt, used similar terms in past contracts?	9	1	1	—	—	—	—	1	19	2	—	—	6	5	14	13
6. Is the term expressly permitted by law or are there commercial justifications for the clause or term, or is it a common or customary term?	32	5	7	2	—	—	1	8	2	1	1	1	—	2	6	3
7. Did buyer have an alternative source for the goods and services in question?	16	4	9	9	3 <sup>200</sup>	—	3	—	11	4	—	—	4	—	3	3
8. Does the term objectively seem to be not "unreasonably favorable" to the seller, in light of the commercial setting?	30	4	3	—	—	—	8	14	4	1	1	—	—	3	3	—
9. Was the transaction free of deception, or unfair surprise?	34	6	2	1	—	—	7	11	—	1	5	1	—	1	1	1

<sup>199</sup> The party asserting unconscionability is not invariably the buyer, but this was the typical situation. In three cases, sellers of cotton asserted that "forward" contracts to sell their 1973 cotton crop at prices ranging from about ten cents per pound to thirty-two cents a pound, were rendered unconscionable when cotton prices took an unanticipated and dramatic rise to about eighty cents per pound. See *Bradford v. Plains Cotton Cooperative Ass'n*, 539 F.2d 1249 (10th Cir. 1976); *R. L. Kinsey Cotton Co., Inc. v. Ferguson*, 214 S.E.2d 360 (Ga. 1975); *West Point-Pepperell, Inc. v. Bradshaw*, 377 F.Supp. 154 (M.D. Ala. 1974); Cf. *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47 (N.D. 1975) (similar case, involving a grain contract).

<sup>200</sup> In three cases, the buyer had no "true" alternative, since the cases involved franchise or lease agreements. See *Arman v. International Harvester Company*, 355 F.Supp. 482 (W. D. Pa. 1973); *Div. of Triple T Service, Inc. v. Mobil Oil Corp.*, 304 N.Y.S.2d 191 (Sup. Ct., Westch. Co. 1969); *Lamoille Grain Co. v. St. Johnsbury and Lamoille County Railroad*, 369 A.2d 1389 (Vt. 1976). In *Lamoille*, for example, a renewal lease contained the limitation of liability, and lessee's only alternative would have been non-renewal and removal of its buildings.

Table 11 (By %)

Question	YES				NO				UNDETERMINED, Inferentially Yes				UNDETERMINED, or Inapplicable			
	Not Uncon.		Uncon.		Not Uncon.		Uncon.		Not Con.		Uncon.		Not Uncon.		Uncon.	
	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.
	50	13	27	0	0	25	33	64	44	13	27	36	06	50	13	0
1.	59	38	27	57	0	0	07	36	35	50	33	0	06	13	33	07
2.	15	13	0	0	06	13	33	43	59	13	0	0	21	63	66	57
3.	24	25	0	0	0	13	33	79	56	13	07	07	21	50	60	14
4.	26	13	07	0	0	0	0	07	56	25	0	0	18	63	93	93
5.	94	88	47	14	0	0	07	57	09	13	07	07	0	25	40	21
6.	47	50	60	64	09	0	20	0	32	50	0	0	12	0	20	21
7.	88	50	20	0	0	0	53	100	12	13	07	0	0	38	20	0
8.	100	75	13	07	0	0	47	79	0	13	33	07	0	13	07	07
9.																

By eliminating the “undetermined” column, and combining the “undetermined/inferentially yes” column with the “yes” column, Table 10 would appear as shown in Table 12.

Table 12

Question	YES				NO			
	Not Unconscionable		Unconscionable		Not Unconscionable		Unconscionable	
	Com.	Cons.	Com.	Cons.	Com.	Cons.	Com.	Cons.
	32 (94)	2 (25)	8 (53)	5 (36)	0 (0)	2 (25)	5 (33)	9 (64)
1.	32 (94)	7 (88)	9 (60)	8 (57)	0 (0)	0 (0)	1 (07)	5 (36)
2.	25 (74)	2 (25)	0 (0)	0 (0)	2 (06)	1 (13)	5 (33)	6 (43)
3.	27 (79)	3 (38)	1 (07)	1 (07)	0 (0)	1 (13)	5 (33)	11 (79)
4.	28 (82)	3 (38)	1 (07)	0 (07)	0 (0)	0 (0)	0 (0)	1 (07)
5.	35 (100)	6 (75)	8 (53)	3 (21)	0 (0)	0 (0)	1 (07)	8 (58)
6.	27 (79)	8 (100)	0 (60)	9 (64)	3 (09)	0 (0)	3 (20)	0 (0)
7.	35 (100)	5 (63)	4 (27)	0 (0)	0 (0)	0 (0)	8 (53)	14 (100)
8.	35 (100)	7 (88)	7 (47)	2 (14)	0 (0)	0 (0)	7 (47)	11 (79)
9.								

Table 10 is reproduced in percentage style in Table 11.

The vast majority of the thirty-five commercial transaction cases finding no unconscionableness answer each of the questions or issues listed in Table 10 in the affirmative, or, more precisely, they did not answer "no" to any of the issues.

In deference to UCC Comment 1 to §2-302, courts in a commercial case are not overly concerned with disparity in bargaining power, so long as the disadvantaged party had a commercially meaningful alternative source of goods or services; nor are the courts concerned here with how the parties allocate risks of various kinds. But oppression and unfair surprise are greeted coolly in the courts. If "oppression" is taken to mean "terms unreasonable favorable to the seller *plus*" lack of meaningful choice, or refusal to bargain, or deceptive conduct, or *overwhelming* disparity in bargaining power, or sophistication, and "unfair surprise" to mean use of small print or needlessly opaque contract language, then some degree of predictability can be gained from an analysis of the commercial cases.

The typical clause or term tested under UCC §2-302 involves some form of limitation of liability, damages, or remedies, with a limitation as to consequential damages most frequently occurring. And, in numerous cases, the court finds before it two knowledgeable, experienced, and sophisticated parties,<sup>201</sup> of approximately equal bargaining power,<sup>202</sup> who have dealt at arms length and from a standpoint of meaningful choice,<sup>203</sup> using contract forms with which they were familiar,<sup>204</sup> and actually bargaining<sup>205</sup> as to the terms of the contract, with no resulting unfair surprise and no oppression. The results are often harsh.<sup>206</sup>

<sup>201</sup> See, e.g., *Boone Valley Cooperative Processing Ass'n v. French Oil Mill Machinery Co.*, 383 F. Supp. 606 (N.D. Iowa 1974); *Earl M. Jorgensen Co. v. Mark Construction, Inc.*, 540 P. 2d 978 (Hawaii 1975); *Kansas City Structural Steel Co. v. L. G. Barcus & Sons, Inc.*, 535 P. 2d 419 (Kan. 1975); *Potomac Electrical Power Co. v. Westinghouse Electric Corporation*, 385 F. Supp. 572 (D.D.C. 1974); *Royal Indemnity Co. v. Westinghouse Electric Corp.* 385 F. Supp. 520 (S.D.N.Y. 1974); *K & C, Inc. v. Westinghouse Electric Corp.*, 263 A. 2d 390 (Pa. 1970); *Blount v. Westinghouse Credit Corporation*, 432 S.W. 2d 549 (Tex. Civ. App. 1968).

<sup>202</sup> See, e.g., *Earl M. Jorgensen Co.*; *Kansas City Structural Steel*; *Potomac Electric*; *Royal Indemnity*; all *id.*, *Bill Stremmel Motors, Inc. v. IDS Leasing-Corporation*, 514 P. 2d 654 (Nev. 1973); *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 381 N.Y.S. 2d 459 (Ct. App. 1976). The courts recognize that parity of bargaining power is rare. See, e.g., *Lamoille Grain Co. v. St. Johnsbury and Lamoille County Railroad*, 369 A. 2d 1389 (Vt. 1976).

<sup>203</sup> See, e.g., *Earl M. Jorgensen Co.*, *Potomac Electric*, *Royal Indemnity* and *Equitable Lumber*, all *supra* n. 201; *Vitex Mfg. Co. v. Caribtex Corp.*, 377 F. 2d 795 (3d Cir. 1967); *First New Jersey Bank v. F.L.M. Business Machines, Inc.*, 325 A. 2d 843 (N.J. Super. 1974); *In re Estate of Young*, 367 N.Y.S. 2d 717 (Sup. Ct. 1975).

<sup>204</sup> See, e.g., *Boone Valley*, *Kansas City Structural Steel*, *K & C, Inc.*, *Equitable Lumber*, and *Potomac Electric*, all *supra*, n. 201; *Dow Corning Corporation v. Capitol Aviation, Inc.*, 411 F. 2d 622 (7th Cir. 1969); *Div of Triple T. Service, Inc. v. Mobil Oil Corp.*, 304 N.Y.S. 2d 191 (Sup. Ct. 1969); *Oak Distributing Co. v. Miller Brewing Co.*, 370 F. Supp. 889 (E. D. Mich. 1973); *Architectural Aluminum Corp. v. Macara, Inc.*, 333 N.Y.S. 2d 818 (Sup. Ct. 1972); *Bill Stremmel Motors, Inc. v. IDS Leasing Corporation*, 514 P. 2d 654 (Nev. 1973); *Wille v. Southwester Bell Tel. Co.*, 549 P. 2d 903 (Kan. 1976).

<sup>205</sup> See, e.g., *Dow Corning, id.*, *Vitex Mfg. Co.*, and *In re Estate of Young*, both *supra*, n. 203; *Potomac Electric*, and *Royal Indemnity*, both *supra*, n. 201; *Bill Stremmel Motors, supra*, n. 202.

<sup>206</sup> In *Boone Valley*, *supra*, n. 201, seller's non-liability for consequential damages may have saved seller — but cost buyer — some 6.4 million dollars. *The Royal Indemnity*, case, *supra* n. 201,

Typically, the courts simply see before them a reasonable allocation of known or undeterminable risks<sup>207</sup> in a commercial setting — and an enforceable contract.

In the few cases in which a commercial contract or clause there of has been ruled unconscionable, a meaningful distinction beyond mere philosophical differences emerges. Two cases highlight the distinction: *Weaver v. American Oil Company*<sup>208</sup> and *Johnson v. Mobil Oil Corporation*.<sup>209</sup> Both cases involved oil company lessees who had signed leases containing a clause limiting the liability<sup>210</sup> of the oil company lessor. Lessees Johnson and Weaver were both high school drop-outs, with Johnson being described by the court as “practically illiterate”. The lease in each case was signed without the benefit of any explanation by oil company representatives: both men were simply told to sign, and they did so. Neither man had legal or otherwise competent representation. The contract was one of adhesion, or “take-it-or-leave-it”<sup>211</sup> and bargaining took place only as to the amount of the rent. On the other hand, no fraud, deception or “sharp practices” were involved, and the two courts seem to disagree as to whether unfair surprise was involved.<sup>212</sup> What was clearly involved in both cases was an immense disparity of bargaining power. In the words of the Indiana Supreme Court:<sup>213</sup>

[T]his is a contract [of adhesion]... submitted (already in printed form) to a party with lesser bargaining power \*\*\* [and] not one who should be expected to know the law or understand the meaning of technical terms. The ceremonious activity of signing the lease consisted of nothing more than the agent of American Oil placing the lease in front of Mr. Weaver and saying “sign,” which Mr. Weaver did. There is nothing in the record to

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involved a loss of \$475,800, and *W. L. May Co., Inc. v. Philco-Ford Corporation*, 543 P. 2d 283 (Ore. 1975), found the May Company with a terminated distributorship and an inventory of Philco-Ford parts which the agreement required them to carry, but which Philco would not repurchase and May could not sell.

<sup>207</sup> See, e.g., *Raybond Electronics, Inc. v. Glen-Mar Door Mfg. Co.*, 528 P. 2d 150 (Ariz. App. 1974); *Mayfair Fabrics v. Hensley*, 226 A. 2d 602 (N.J. 1967); *Lamoille Grain Co.*, *supra*, n. 336; *K & C, Inc.*, *supra*, n. 201; *Dow Corning*, *supra*, n. 204; *Vitex Mfg. Co.*, *supra*, n. 203 *W. L. May Co., Inc. v. Philco-Ford Corporation*, *id.*; *In re Estate of Young*, 367 N.Y.S. 2d 717 (Sup. Ct. 1975); The cotton price cases, *supra*, n. 199 also involve allocation of known risks, as do liquidated damages cases, such as *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W. 2d 47 (N.D. 1975).

<sup>208</sup> 276 N.E. 2d 144 (Ind. 1971).

<sup>209</sup> 415 F. Supp. 264 (E.D. Mich. 1976).

<sup>210</sup> The *Johnson* case involved a limitation of damages clause; *Weaver* involved a clause more aptly describable as an exculpation clause, which among other things, insulated the oil company from liability for defects in the premises and made lessee the insurer of the company under an “indemnity and hold harmless” provision.

<sup>211</sup> The fact that the contract is prepared by one party and offered on a “take-it-or-leave-it” basis, does not alone define an “adhesion contract,” but if combined with disparate bargaining power and absence of meaningful choice the “adhesion” label or conclusion may be applied by the court as a short-hand reference to unconscionability. See *Clinic Masters v. District Court for City of El Paso*, 556 P. 2d 473 (Colo. 1976).

<sup>212</sup> The court in *Johnson* expressly did not find “unfair or oppressive” conduct, but the *Weaver* court focused long and hard on the problem of fine print, absence of title headings, and the generally complicated contract language.

<sup>213</sup> A court not renowned for ground-breaking decisions.

indicate that Weaver read the lease; or that the agent in any manner, attempted to call Weaver's attention to the "hold harmless" clause [in fine print, with no title heading] \*\*\* [which] was never explained to him in a manner from which he could grasp [the] legal significance [nor] did [American] advise Weaver that he should consult legal counsel, before signing the lease. The superior bargaining power of American Oil is patently obvious and the significance of Weaver's signature... amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil.<sup>214</sup>

That the *legal* principle involved in a finding of unconscionability is lack of consent in a free and deliberate manner was echoed by the United States District Court for the Eastern District of Michigan:

[B]efore a contracting party with the immense bargaining power of Mobil.... may limit its liability vis-a-vis an uncounseled layman...., it has an affirmative duty to obtain the voluntary, knowing assent of the other party. This could easily have been done.... by explaining.... in laymen's terms the meaning and possible consequences of the.... clause. Such a requirement does not detract from the freedom to contract, unless that phrase denotes the freedom to impose the onerous terms of one's carefully drawn printed document on an unsuspecting contractual partner. Rather, freedom to contract is enhanced by a requirement that both parties be aware of the burdens they are assuming. The notion of free will has little meaning as to one who is ignorant of the consequences of his acts.<sup>215</sup>

It is perhaps instructive to point out that a termination clause in a presumably similar Mobil lease was not found to be unconscionable as to a *corporate* lessee in *Division of Triple T Service, Inc. v. Mobil Oil Corporation*,<sup>216</sup> by a court responsible for more than its fair share of cases finding unconscionable contracts. It is not, however, intended to suggest that mere corporate form is an outcome-determinative factor.<sup>217</sup>

Judges tend to examine first the *terms* of the contract alleged to be unconscionable and if they are not unreasonably favorable to one party, the inquiry into unconscionability typically ends;<sup>218</sup> but if the terms appear unreasonably favorable to one party, then the possibility of a lack of a real and voluntary meeting of the minds, or "consent" is injected into the case and inquiry must be made of such factors as the age, education, intelligence and business experience of, or presence of capable advisors for, the apparently disadvantaged party; the relative bargaining power of the parties; who drafted the contract; whether the terms should have been explained;<sup>219</sup> whether the advantaged party was willing to negotiate on the terms; and whether the disadvantaged party had a meaningful alternative choice.<sup>220</sup> With such an approach in mind, one can explain the

<sup>214</sup> 276 N.E. 2d at 145-146.

<sup>215</sup> 415 F. Supp. at 269.

<sup>216</sup> 304 N.Y.S. 2d 191 (Sup. Ct. 1969).

<sup>217</sup> Corporate litigants successfully asserted unconscionability in *Chrysler Corporation v. Wilson Plumbing Co., Inc.*, 208 S.E. 2d 321 (Ga. App. 1974), and *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W. 2d 169 (Iowa, 1975).

<sup>218</sup> See YOUNGER, "A Judge's View of Unconscionability," 5 *U.C.C. L. J.* 348, 349 (1973); Cf. *Williams v. Walker Thomas Furniture Co.* 350 F. 2d 445 (D. C. Cir. 1965); *Allen v. Michigan Bell Tel. Co.*, 171 N.W. 2d 689 (Mich. App. 1969).

<sup>219</sup> Clauses in fine print would be particularly susceptible, as in *Weaver*; see also *Architectural Cabinets, Inc. v. Gaster*, 291 A. 2d 298 (Dela. Super. 1971).

<sup>220</sup> *Johnson v. Mobil Oil Corporation* supra, n. 209.

significance of the fact that the clause in *Weaver* was in fine print, while that fact had no particular significance in three commercial transactions cases finding no unconscionability,<sup>221</sup> for as the United States District Court for the Southern District of New York wryly observed there is no unfair surprise<sup>222</sup> where competent parties are involved, for "to suggest that [the utility company's] representatives failed to read the documents.... charges them with dereliction of duty or incompetence."<sup>223</sup>

The typical clauses tested in consumer cases under §2-302 were limitations on liability, and disclaimer of implied warranties. As disclosed by Table 10, a high proportion of the tested clauses or terms were those expressly permitted by law or those which seem to be commercially reasonable. When a clause is expressly permitted by law, unconscionability will not be found unless other factors appear.<sup>224</sup> In short, if the term or clause is authorized by state law, the term or clause cannot be "unreasonably favorable" to the creditor; if procedural fairness is found, the term will be enforced.

In general, limitation of liability clauses in consumer contracts do not fare well, most probably because of lack of explanation,<sup>225</sup> small print,<sup>226</sup> deception,<sup>227</sup> and commercial unreasonableness;<sup>228</sup> in short, the *Weaver-Johnson* approach is employed.

An analysis of unconscionability in consumer transactions then, involves an initial inquiry into the terms of the contract: does the term(s) seem out of

<sup>221</sup> See *First New Jersey Bank v. F. L. M. Business Machines Inc.*, 325 A. 2d 843 (N.J. Super. 1974); *Royal Indemnity Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974); *Boone Valley Cooperative Processing Ass'n v. French Oil Mill Machiner Co.*, 383 F. Supp. 606 (N.D. Iowa 1974).

<sup>222</sup> See *Architectural Cabinets, Inc. v. Gaster*, 291 A. 2d 298 (Del. Super. 1971) (fine print); *Chrysler Corp. v. Wilson Plumbing Co., Inc.*, 208 S.E. 2d 321 (Ga. App. 1974) (retailer attempting to gain advantage of manufacturer's disclaimer of implied warranties given to buyer at time of delivery of automobile).

<sup>223</sup> *Royal Indemnity Co. v. Westinghouse Electric Corp.*, supra n. 201.

<sup>224</sup> The "previous balance" method of computing finance charges on open-end credit accounts is an example. See *Zachary v. R. H. Macy & Co.*, 323 N.Y.S. 2d 757 (Sup. Ct. 1971); *Johnson v. Sears Roebuck & Co.*, 303 N.E. 2d 627 (Ill. App. 1973). The previous balance method seems to be authorized by La. R.S. 9: 3323. See also, *Gimbel Bros., Inc. v. Swift*, 307 N.Y.S. 2d 952 (N.Y. Civ. Ct., N.Y. Co. 1970) (enforcing a common-law confession of judgment authorized by New York law).

<sup>225</sup> See *Bogatz v. Case Catering Corp.*, 383 N.Y.S. 2d 535 (N.Y.C. Civ. Ct., 1976), in which a caterer's contract right to the full amount due upon cancellation of the wedding was held unconscionable as a penalty clause, not explained to consumers, nor their attention drawn to its importance. Cf. *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S. 2d 268 (N.Y.C. Civ. Ct., 1973).

<sup>226</sup> See *Bogatz, id.*; *Dean v. Universal C.I.T. Credit Corporation*, 275 A. 2d 154 (N.J. Super. 1971); *Seabrook v. Commuter Housing Co., Inc.*, 338 N.Y.S. 2d 67 (N.Y.C. Civ. Ct., 1972).

<sup>227</sup> See *McCarty v. E. J. Korvette Inc.*, 347 A. 2d 253 (Md. App. 1975) (court concludes that it was unconscionably unfair for a tire seller to advertise and expressly warrant against blow-outs, only to later stipulate that seller will do no more than replace any tires that do blow out); *Walsh v. Ford Motor Co.*, 298 N.Y.S. 2d 538 (Sup. Ct. 1969).

<sup>228</sup> See *Dean v. Universal C.I.T. Credit Corporation*, supra, n. 226; *Walsh v. Ford Motor Company*, supra n. 227. Cf. *Collins v. Uniroyal, Inc.*, 315 A. 2d 16 (N.J. 1974).



proportion to the risks of the creditor? If the terms are *unreasonably* favorable to the creditor, it suggests an impairment of the deliberate and informed consent to which the legal system aspires as a standard. The suggestion of impaired consent can be confirmed if, in addition to the unreasonably favorable terms, there is found the lack of a meaningful alternative choice. But whether there is an absence of meaningful choice depends entirely on the circumstances of each case. The buyer who is “locked” in to a particular creditor may have no alternative but to accede to terms actually understood; where fine print, unintelligible legal jargon, referral sales schemes or similar deception is also present, the finding of unconscionability is simply facilitated. For the buyer not forced to deal with a given creditor, the ability to “walk away” from the proposed transaction may not in fact be present, if the buyer is lacking in ability to protect himself, i.e., there is a *gross* disparity of bargaining position or sophistication, requiring that the creditor be likened to a fiduciary, and the creditor, because of his terms, and because of the attendant circumstances, be saddled with the burden of proving the *conscionability* of the transaction — quite a distance to have travelled from the starting point of caveat emptor.

Perhaps the doctrine of unconscionability in consumer transactions most readily can be graphically illustrated by three cases of relatively recent origin: *Seabrook v. Commuter Housing Co., Inc.*,<sup>229</sup> *Kugler v. Romain*,<sup>230</sup> and *State v. ITM, Inc.*<sup>231</sup>

In *Seabrook*, a consumer signed a lease of dwelling space in a building then still under construction, paying therewith a deposit of \$464. The parties stipulated that if the building was not completed on the contemplated day of occupancy, occupancy would begin on the day the building was completed. The building was not ready for occupancy four months after the lease was to have begun. The consumer wanted out of the contract, and a return of the deposit. The landlord chose to stand firm in reliance on the contract term permitting retention of the deposit in cases of non-performance by the lessee. In ruling the term unconscionable, the court focused on the following factors:

1. The lessee had neither legal assistance nor knowledge, expertise, or sophistication as to landlord-tenant law, nor was she an experienced lessee;
2. the lease form was exceedingly lengthy and complex, containing some fifty-four clauses within four pages of text;
3. The lease contained some 10,000 words, many of which were highly technical in nature, and some of which were in small print and practically illegible.

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<sup>229</sup> 338 N.Y.S. 2d 67 (N.Y.C. Civ. Ct. 1972).

<sup>230</sup> 279 A. 2d 640 (N.J. 1971).

<sup>231</sup> 275 N.Y.S. 2d 303 (Sup. Ct. 1966).

Against this background, the court found the lease unconscionable, as containing terms unreasonably favorable to the lessor, signed by a lessee who could not be expected to fully comprehend or intelligently execute such a lease; but the unconscionability could have been avoided by performance of an affirmative duty recognized by the court to bring clauses such as relied on by the lessor to the attention of the prospective lessee and *explain* their meaning prior to asking the lessee to execute the lease.<sup>232</sup>

The *ITM* case involved what is commonly referred to as an “endless chain” sales plan,<sup>233</sup> by which color television sets and other products were sold door-to-door, following a deceptive<sup>234</sup> introductory pitch by which seller gained admission to the home. As a part of the sales scheme — a first cousin of the referral sale — the buyers were told that the products (the quality of which was substantially misrepresented) would cost them nothing since by the commissions and bonuses they would earn, not only would the products be paid for, the buyer’s home mortgages could be paid off as well. This deception was compounded by high pressure sales techniques;<sup>235</sup> and later attempts to cancel were met by threats to enforce a clause calling for a penalty of 20% of the price, lawsuits, wage garnishment, loss of jobs, and so on.<sup>236</sup>

*ITM* actually contains alternative approaches to unconscionability. In the first place, seller made no disclosure or explanation to each buyer regarding his respective standing in the geometric progression<sup>237</sup> of the endless-chain or “pyramid” sales scheme. The reasoning of *Seabrook*, *Weaver*, and *Johnson* might well have condemned enforceability on that ground alone. But additionally, the units sold were priced from two to six times unit cost.

In *Kugler*, a case quite similar to *ITM*, the relationship between contract price, unit cost, and value was also a key factor. Involved were door-to-door sales of “educational” books consciously aimed at minority groups in urban areas — typically persons on welfare or with incomes of less than \$5,000 per year. The books were found to have practically *no* educational value for the children in the

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<sup>232</sup> In *Diamond Housing Corporation v. Robinson*, 257 A. 2d 492 TD.C. App. 1969), a lessee who had signed a lease form containing a waiver of notice to quit on non-payment of rent, pointed out that she had only a limited education and did not understand the term “notice to quit,” and argued that the landlord should have orally explained the provision to her. The court, noting that the clause was not hidden or obscured, and that attention to the clause was drawn by the words “Notice to Quit” in bold-face type, held that there was no basis on which to impose such a duty on a landlord. The court also took the view that such waivers are common and therefore not a term “unreasonably favorable” to a lessor. Of course, the lessee’s case was not aided at all by her admitted failure to pay the rent.

<sup>233</sup> See also, *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W. 2d 624 (Iowa 1971).

<sup>234</sup> Seller’s representatives obtained appointments via telephone contacts in which a “money-making plan” was the key item of conversation.

<sup>235</sup> When Seller’s representatives would be asked to leave, or to return later, prospective buyers were told, for example, “it’s now or never.”

<sup>236</sup> The evidence disclosed that seller had in fact utilized “sewer service” and perjured affidavits to obtain default judgment in numerous cases. That, of course, is a violation of due process, among other things.

<sup>237</sup> See *Koscot*, *supra* n. 233.

age group and socio-economic position seller represented would be benefited therefrom. Other misrepresentations were in attendance,<sup>238</sup> as in *ITM*, and once again, harsh collection techniques were found to have been employed.<sup>239</sup>

The price was found to be unconscionable, the lack of an explanation of the obligation by seller to buyers obviously not capable of understanding the real bargain they were making no doubt a strong contributing factor. The relationship between unreasonably favorable terms and absence of meaningful choice was clear: "an exorbitant price ostensibly agreed to by a purchaser of the type involved in this case — but in reality unilaterally fixed by the seller and not open to negotiation — constitutes an unconscionable bargain."<sup>240</sup>

*Unconscionability in Consumer Transactions — a Recapitulation.*

Whether confronted with purely mercantile agreements or with consumer transactions, those decisions finding unconscionability rely on a sort of sliding-scale balancing of what are usually referred to as the "procedural" and "substantive" factors which underlie the particular case. Once the decision is made that the terms appear to be unreasonably favorable to the creditor (the substantive factor) an examination of the nature of the debtor's consent *i.e.*, the meaningfulness of his choice and his apparent ability to protect himself (the procedural factors) may reveal an unconscionable or unconsented to bargain. An extremely harsh or unreasonably favorable term may be held unenforceable with mere lip service to the requirement of procedural unconscionability.<sup>241</sup> By contrast, the clear absence of a meaningful choice, or other factors which contribute thereto, may compel a court to withhold enforcement of terms expressly permitted by law.<sup>242</sup>

<sup>238</sup> Seller's representatives told prospective buyers that they were selling under a special federal grant, sometimes mentioning "Head Start," sometimes "for the Board of Education," or "the School System," or for a named school. Misrepresentation was also typically made as to the real price of the package, the cancellability of the contract, and as to the resultant achievability of a high school equivalency diploma.

<sup>239</sup> Seven hundred and seventy-nine collection actions had been filed by seller between 1964 and 1968; six hundred and twenty-eight — about eighty-two per cent — resulted in judgment against the buyer.

<sup>240</sup> 277 A. 2d at 114.

<sup>241</sup> See *Ashland Oil, Inc. v. Donahue*, 223 S.E. 2d 433 (W. Va. 1976) (involving a ten-day termination clause, unilaterally exercisable by the franchisor).

<sup>242</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A. 2d 69 (N.J. 1960), cited by the Comments to UCC §2-302, provides an example: a disclaimer of warranties clause, expressly permitted by UCC §2-316 was found to be in fine print, "hidden" on the backside of the contract, written in all-but incomprehensible language in a contract which not only was not subject to bargaining between the parties, but which was used in substantially similar form by all automobile retailers. A like evaluation can be made of *Williams v. Walker-Thomas*, in that the price of the stereo may have been within normal "markup," and the pro-rata clause is not necessarily unreasonably favorable to seller, since UCC §9-204 (5) arguably permits the "cross collateralization of future advances. Cf. *Singer Company v. Gardner*, 323 A. 2d 457 (N.J. 1974).

Table 13  
AN ANALYSIS OF THE DECISIONS REFUSING  
ENFORCEMENT ON THE GROUND OF UNCONSCIONABILITY

CASES	uncomprehensible language <sup>1</sup>	fine print, no time to draw n to clause <sup>1</sup>	inordinate length <sup>1</sup>	language barrier <sup>1</sup>	education barrier <sup>1</sup>	failure to give needed explanation <sup>1</sup>	description or misrepresentation involved <sup>1</sup>	due to door sale setting <sup>1</sup>	form contract used <sup>1</sup>	lack of various bargaining as to terms(s) <sup>1</sup>	high pressure sales tactics utilized <sup>1</sup>	was public policy or other equitable approach an alternative analysis <sup>1</sup>	allowance of time to draw n to clause <sup>1</sup> but not receive substantial benefits <sup>1</sup>	allowing sale of things which did not, with reasonable probability, be repaid in full <sup>1</sup>
1. Ashland Oil, Inc. v. Donahue <sup>*243</sup>	ni	ni	ni	ni	ni	ni	ni	no	Ys	ni	ni	Pr <sup>244</sup>	no	no
2. Walsh v. Ford Motor Co. <sup>245</sup>	Po <sup>246</sup>	ni	ni	ni	ni	ni	Po <sup>247</sup>	no	Ys	ni	ni	Pr <sup>248</sup>	no	no
3. United States Leasing Corp. v. Franklin <sup>*249</sup>	ni	ni	ni	no	no	ni	ni	no	Pr <sup>250</sup>	ni	ni	Pr	no	no
4. McCarty v. E.J. Korvette <sup>251</sup>	ni	ni	ni	ni	ni	ni	Po <sup>252</sup>	no	Pr	ni	ni	Pr <sup>253</sup>	no	no
5. Collins v. Uniroyal, Inc. <sup>254</sup>	ni	ni	ni	ni	ni	ni	ni	no	Pr	ni	ni	Pr <sup>255</sup>	no	no
6. Majors v. Kalo Labs <sup>*256</sup>	ni	ni	ni	ni	ni	ni	Po <sup>257</sup>	no	ni	ni	ni	Pr <sup>258</sup>	Po <sup>259</sup>	no
7. Oldis v. Grosse-Rhode <sup>*260</sup>	ni	ni	ni	ni	ni	ni	ni	no	ni	ni	ni	Pr <sup>261</sup>	no	no
8. Denkin v. Sterner <sup>*262</sup>	ni	ni	ni	ni	ni	ni	ni	ni	ni	ni	ni	Pr <sup>263</sup>	no	no
9. Fairfield Lease Corp. v. Umberto <sup>*264</sup>	ni	ni	ni	ni	ni	ni	ni	no	Ys	Ys	ni	Pr <sup>265</sup>	no	no
10. Fairfield Lease Corp. v. Pratt <sup>*266</sup>	ni	ni	ni	ni	ni	ni	ni	no	Ys	Inf <sup>267</sup>	ni	Pr <sup>268</sup>	no	no
11. Ellsworth Dobbs, Inc. v. Johnson <sup>*269</sup>	ni	ni	ni	ni	ni	Ys	ni	no	Ys	Ys	ni	Pr <sup>270</sup>	an	no
12. C & J Fertilizer v. Allied Mut. Ins. Co. <sup>*271</sup>	ni	ni	Po <sup>272</sup>	ni	ni	ni	ni	no	Ys	Ys	ni	Pr <sup>273</sup>	no	no
13. Jefferson Credit Corp. v. Marciano <sup>274</sup>	ni <sup>275</sup>	ni	ni	Ys	Po <sup>276</sup>	ni	Po	no	Inf	Ys	ni	Ys <sup>277</sup>	Po <sup>278</sup>	Po <sup>279</sup>
14. Bogatz v. Case Catering Corp. <sup>280</sup>	ni	Ys	ni	ni	ni	Ys	ni	no	ni	ni	ni	Ys <sup>281</sup>	an	no
15. Nu Dimensions Figure Salon v. Becerra <sup>*282</sup>	ni	ni	ni	ni	ni	Ys	Ys <sup>283</sup>	no	Pr	Pr	Ys	Ys <sup>284</sup>	an	no
16. Chrysler Corp. v. Wilson Plumbing Co. <sup>*285</sup>	ni	Ys	ni	ni	ni	Ys	ni	no	Ys	Pr	ni	Ys <sup>286</sup>	no	no
17. Architectural Cabinets, Inc. v. Gaster <sup>*287</sup>	ni	Ys	ni	ni	ni	Ys	ni	no	Pr	Pr	ni	no <sup>288</sup>	no	no
18. Dean v. Universal C.I.T. Credit Corp. <sup>289</sup>	ni	Ys	ni	ni	ni	Ys	ni	no	Pr	Pr	ni	Ys <sup>290</sup>	no	no
19. Seabrook v. Commuter Housing Co., Inc. <sup>291</sup>	Ys <sup>292</sup>	Ys	Ys	ni	ni	Ys	ni	no	Ys	Pr	ni	Ys <sup>293</sup>	no	no
20. Brooklyn Union Gas Co. v. Jimenez <sup>*294</sup>	ni	ni	ni	Ys <sup>295</sup>	ni	Ys <sup>296</sup>	ni	no	ni	ni	Ys <sup>297</sup>	ni	no	no
21. Weaver v. American Oil Co. <sup>*298</sup>	Pr <sup>299</sup>	Ys	ni	ni	Ys <sup>300</sup>	Ys	ni <sup>301</sup>	no	Ys	Ys	ni	Po <sup>302</sup>	no	no
22. Johnson v. Mobil Oil Co. <sup>*303</sup>	Pr	ni	ni	ni	Ys	Ys	ni	no	Ys	Ys	ni	Po <sup>304</sup>	no	no
23. American Home Improvement, v. MacIver <sup>305</sup>	ni	ni	ni	ni	ni	Ys <sup>306</sup>	Ys <sup>307</sup>	ni	Pr	Pr	ni	Ys <sup>308</sup>	no	no
24. Toker v. Pearl <sup>309</sup>	ni	ni	ni	ni	ni	Ys	Ys <sup>310</sup>	Ys	Pr	Ys <sup>311</sup>	Pr <sup>312</sup>	ni	no	no
25. Jones v. Star Credit <sup>313</sup>	ni	ni	ni	ni	Inf <sup>314</sup>	Ys	ni	Ys	Pr	Pr	ni	ni	ni	Po <sup>315</sup>
26. Frostifresh Corp. v. Reynoso <sup>316</sup>	ni	ni	ni	Ys	ni	Ys	Ys <sup>317</sup>	no	Pr	Ys	Ys	ni	no	Ys <sup>318</sup>
27. Toker v. Westernman <sup>319</sup>	ni	ni	ni	ni	Inf <sup>320</sup>	ni	ni	Ys	Pr	Pr	ni	ni	no	Po <sup>321</sup>
28. State v. ITM, Inc. <sup>322</sup>	ni	ni	ni	ni	ni	Ys	Ys <sup>323</sup>	Ys	Ys	Ys	Ys <sup>324</sup>	ni	Ys <sup>325</sup>	Ys <sup>326</sup>
29. Kugler v. Romain <sup>327</sup>	ni	ni	ni	ni	Ys <sup>328</sup>	Ys	Ys <sup>329</sup>	Ys	Ys	Ys	Ys	ni	Ys <sup>330</sup>	Ys <sup>331</sup>
30. Allen v. Michigan Bell Tel. Co. <sup>*332</sup>	ni	ni	ni	ni	ni	ni	ni	no	Ys	Ys	ni	Pr <sup>333</sup>	no	no
31. Williams v. Walker-Thomas Furn. Co. <sup>334</sup>	ni	Ys	ni	ni	Ys <sup>335</sup>	Ys	no	Ys	Pr	Pr	Ys	ni	no	Ys <sup>336</sup>
32. Henningsen v. Bloomfield Motors, Inc. <sup>337</sup>	Ys <sup>338</sup>	Ys	ni	ni	ni	Ys	no	no	Ys	Ys	ni	Pr <sup>339</sup>	no	no
33. Unico v. Owen <sup>340</sup>	ni	ni	ni	ni	ni	ni	ni	no	Pr	Ys	ni	Ys <sup>341</sup>	no	no
34. Green v. Arcos, Ltd. <sup>*342</sup>	no	no	ni	no	no	ni	no	no	ni	ni	ni	Pr	no	no
35. Meyer v. Packard Cleveland Motor Co. <sup>*343</sup>	no	ni	ni	ni	ni	Po <sup>344</sup>	Ys <sup>345</sup>	no	Pr	Ys	ni	Ys <sup>346</sup>	no	no
36. Hardy v. GMAC <sup>347</sup>	no	ni	ni	ni	ni	Po <sup>348</sup>	ni	no	Pr	Pr	ni	Ys <sup>349</sup>	no	no
37. Bekkevold v. Potts <sup>*350</sup>	no	ni	ni	ni	ni	Po <sup>351</sup>	ni	no	Pr	Pr	ni	Ys <sup>352</sup>	no	no
38. Kansas Flour Mills Co. v. Dirks <sup>*353</sup>	no	no	ni	no	no	ni	no	no	ni	no	no	no	no	no
39. Kansas City Whse. Groc. Co. v. Weber Packing <sup>*354</sup>	no	no	ni	no	no	no	no	no	Pr	ni	no	Po <sup>355</sup>	no	no
40. New Prague Flouring Mills Co. v. Spears <sup>*356</sup>	Ys <sup>357</sup>	Ys	Ys	no	no	Ys <sup>358</sup>	Po <sup>359</sup>	no	Ys	Ys	ni	Ys	no	no
41. F.C. Austin Co. v. J.H. Tillman Co. <sup>*360</sup>	ni	ni	no	no	no	no	Po <sup>361</sup>	no	ni	no	ni	Ys <sup>362</sup>	no	no
42. Andrews Bros., Ltd. v. Singer and Co. <sup>*363</sup>	no	no	no	no	no	no	Ys <sup>364</sup>	no	Ys	ni	no	ni	no	no
43. Robt. A. Munro & Co., Ltd. v. Meyer <sup>*365</sup>	no	no	no	no	no	no	no	no	Pr	ni	no	ni	no	no

non-consumer transaction

\* Key: ni (not indicated); Po (possibly); Pr (probably); an (analogous situation); inf (inferably).

Table 13 emphasizes that the vast majority of the unconscionability cases involve defects of consent, with an occasional “public policy” pronouncement thrown in. The question which so obviously springs from Table 13 is: how would these forty-three cases have been decided under the Louisiana Civil Code? Although the research in this regard is at present incomplete, the preliminary findings indicate that a very high percentage of the results in these cases would be duplicated in Louisiana. Table 14 demonstrates the point.

Table 14  
THE UNCONSCIONABILITY CASES — LOUISIANA  
EQUIVALENTS (TENTATIVE ANALYSIS)

CASES	lack of consent: error of fact as to determining motive	lack of consent: fraud	failure of seller to clearly explain extent of his obligations	term ambiguous or obscure	non-ambiguous term nevertheless leads to an absurd result	term favors a party who has himself not performed
	1819 1825 1842	1832 1847 2547	2474 1901	1957 1958	1945 1950	2046
1. Ashland Oil, Inc. v. Donahue*				*		
2. Walsh v. Ford Motor Co.				*		
3. United States Leasing Corp. v. Franklin*						
4. McCarty v. E.J. Korvette				*		
5. Collins v. Uniroyal, Inc.				*		
6. Majors v. Kalo Laboratories*	*	*	*	*		
7. Oldis v. Grosse-Rhode*						
8. Denkin v. Sterner*						
9. Fairfield Lease Corp. v. Umberto*						
10. Fairfield Lease Corp. v. Pratt*						
11. Ellsworth Dobbs, Inc. v. Johnson*	*			*	*	*
12. C & J Fertilizer v. Allied Mut. Ins. Co.*	*			*		
13. Jefferson Credit Corp. v. Marciano		*	*	*	*	
14. Bogatz v. Case Catering Corp.	*			*		
15. Nu Dimensions Figure Salon v. Becerra		*				
16. Chrysler Corp. v. Wilson Plumbing Co.*			*	*		
17. Architectural Cabinets, Inc. v. Gaster*	*			*		
18. Dean v. Universal C.I.T. Credit Corp.				*		
19. Seabrook v. Commuter Housing Co., Inc.	*			*	*	*
20. Brooklyn Union Gas Co. v. Jimenez*	*			*	*	*
21. Weaver v. American Oil Co.*	*			*	*	
22. Johnson v. Mobil Oil Co.*	*			*	*	
23. American Home Improvement Co. v. MacIver		*		*		
24. Toker v. Pearl	*	*			*	*
25. Jones v. Star Credit					*	
26. Frostifresh Corp. v. Reynoso		*	*	*		
27. Toker v. Westerman					*	
28. State v. ITM, Inc.	*	*	*	*	*	
29. Kugler v. Romain	*	*	*	*	*	*
30. Allen v. Michigan Bell Telephone Co.*						
31. Williams v. Walker-Thomas Furniture Co.	*	*	*	*	*	*
32. Henningsen v. Bloomfield Motors, Inc.	*		*	*		
33. Unico v. Owen				*		*
34. Green v. Arcos, Ltd.*						*
35. Meyer v. Packard Cleveland Motor Co.*		*	*	*		*
36. Hardy v. GMAC			*	*		
37. Bekkevold v. Potts*			*	*		
38. Kansas Flour Mills Co. v. Dirks*			*	*	*	
39. Kansas City Wholesale Groc. Co. v. Weber*			*	*		*
40. New Prague Flouring Mills Co. v. Spears*	*		*	*		
41. F. C. Austin Co. v. J.H. Tillman Co.*				*		*
42. Andrews Bros., Ltd. v. Singer & Co.*	*	*	*	*		*
43. Robt. A. Munro & Co., Ltd. v. Meyer*	*		*	*		*

\* non-consumer transactions

It is anticipated, of course, that the tentative analysis presented in Table 14 can be substantiated in the completed research by reference to Louisiana jurisprudence. To the extent such substantiation can be found (and much of it has been found), the conclusion must be drawn that §3551 of the 1972 Louisiana Consumer Credit Law was cumulative in relation to the Louisiana Civil Code.

<sup>243</sup> 223 S.E. 2d 433 (W. Va. 1976) (ten-day termination right by lessor).

<sup>244</sup> The court expressly found no disparity of bargaining power and did not "find it necessary to base [the] holding [that the contract was unconscionable on its face] upon a disparity of bargaining power." 223 S.E. 2d at 440. Accordingly, "public policy" would seem to have been an alternative holding. See, also, *Unico v. Owen*, 232 A. 2d 405 (N.J. 1967).

<sup>245</sup> 298 N.Y.S. 2d 538 (Sup. Ct. 1969) (replacement as exclusive remedy).

<sup>246</sup> The contract both disclaimed all warranties, and limited remedies available for a breach of warranty — creating something of an ambiguous undertaking.

<sup>247</sup> *Id.* Within the context of this category, "deception" does not necessarily refer to a misrepresentation or an act of concealment of information; rather, the connotation is that of the FTC: having the ability to mislead. In that sense the ambiguous nature of the contract may have deceived the buyer in Walsh.

<sup>248</sup> Buyer in *Walsh* sued for personal injuries caused by the breach. UCC §2-719 (3) states the public policy as to limitation of liability in such cases: it is prima facie unconscionable in a consumer sale.

<sup>249</sup> 319 N.Y.S. 2d 531 (N.Y.C. Civ. Ct. 1971) (lessee not to set off claims).

<sup>250</sup> In several cases, the writer has indicated that form contracts were "probably" used. This presumption is borrowed from those pronouncements of courts in "judicial notice" cases: courts surely are deemed to know what the average persons knows, to wit, a transaction which does not involve a form contract is rare.

<sup>251</sup> 347 A. 2d 253 (Md. App. 1975).

<sup>252</sup> The opinion in *McCarty* characterized it as "unfair" for a seller to advertise and expressly warrant against "blow-outs" in a tire, only then to say "we, of course, will replace any tires that do blow-out." Cf. *Walsh v. Ford Motor Co.*, *supra*, n. 245.

<sup>253</sup> The comments in n. 248, *supra*, are a propos.

<sup>254</sup> 315 A. 2d 16 (N.J. 1974) (limitation of liability).

<sup>255</sup> Seller, unsuccessfully relied on the apparent inability of buyer's survivors to prove that a defect, as opposed (for example) to a road hazard, caused the blow-out in the tire. Because seller's contract was prima facie unconscionable, (see n. 248 *supra*) the absence of a defect was held not to overcome the presumption of unconscionability.

<sup>256</sup> 407 F. Supp. 20 (M.D. Ala. 1975) (exclusion of consequential damages).

<sup>257</sup> Seller sold its soybean inoculant as "100% guaranteed," yet limited the guarantee to a return of the purchase price, knowing that there was some uncertainty as to the effectiveness of its new (and perhaps experimental) product. This was not apparently disclosed to buyer.

<sup>258</sup> The *Majors* decision distinguishes between limitations on consequential damages which operate merely to prevent a seller of such agricultural products as soybean inoculant from becoming an insurer of crop yields — an outcome affected by innumerable variables beyond seller's control — and an exclusion or limitation thrown up as a defense to a claim of crop loss based on alleged latent defects in the product itself. To allow such a limitation to operate in the case of a defect would have permitted buyer in *Majors* to recover only about 30 cents per acre (the price of the product), yet he'd have expenditures in planting, harvesting, and cultivating of about \$90 per acre — as seller well knew. The case is alternatively viewable as a UCC §2-719 (2) case: a limited remedy which has been caused by the circumstances to "fail of its essential purpose," and one in which the remedy is grossly disproportionate to the anticipated expenses a buyer would incur in order to use the product. See also, *Corneli Seed Co. v. Ferguson*, 64 So. 2d 162 (Fla. 1953).

<sup>259</sup> Because of the circumstances outlined in n. 258, *id.*, seller knowingly sold a thing from which buyer might well receive no benefits at all, in fact, losses were foreseeable to buyer.

<sup>260</sup> 528 P. 2d 944 (Colo. App. 1974) (retention of payment: liquidated damages).

V. — TENTATIVE CONCLUSIONS REGARDING THE RELATIONSHIP  
BETWEEN THE 1972 CONSUMER CREDIT LEGISLATION  
AND THE LOUISIANA CIVIL CODE.

With federal preemption in mind, and in view of the analysis hereinabove of §3551, it seems clear that the 1972 legislation added very little substance to Louisiana law. Provisions as to maximum charges, "multiple" agreements,

<sup>261</sup> The contract in *Oldis* purported to allow the seller of a restaurant to retain all payments made by the buyer upon buyer's default, as "liquidated damages." Thus, seller could theoretically have retained 1% or 99% of the contract price, depending upon when the buyer defaulted. As a policy matter, the clause could readily be seen as an unenforceable common law "forfeiture" rather than as a liquidated damages clause.

<sup>262</sup> 10 Pa. D & C. 2d 203 (York Co. C. P. 1956) (buyer liable for full contract price upon default).

<sup>263</sup> On default, contract gave seller the right to enter a judgment for the full amount of the unpaid price. As an alternative holding, the clause was a liquidated damages clause providing unreasonably large liquidated damages and for that reason unenforceable.

<sup>264</sup> 7 UCC Rep. 1181 (N.Y. Civ. Ct. 1970) (any violation led to acceleration of unearned rent).

<sup>265</sup> Notes 261, 263, *supra*, are a propos.

<sup>266</sup> 278 A. 2d 154 (Conn. Cir. Ct. 1971) (same as n. 264, *supra*).

<sup>267</sup> In the *Umberto* case, nothing in the form lease was changed by "negotiation;" one assumes that the same approach obtained in *Pratt*.

<sup>268</sup> Notes 261, 263 *supra*, are a propos.

<sup>269</sup> 236 A. 2d 843 (N.J. 1967) (broker's commission deemed "earned" even if buyer failed to close the sale).

<sup>270</sup> The prospect that a real estate vendor would be required to pay a realtor's commission even if the buyer does not "close" the sale, was found by the court as "so contrary to the common understanding of men, and also so contrary to common fairness, as to require a court to condemn it as unconscionable." 236 A. 2d at 857. Yet, the court also classifies the real estate broker as one "affected by a public interest."

<sup>271</sup> 227 N.W. 2d 169 (Iowa 1975) (insurance policy defined "burglary" dolely in terms of a visably forced entry).

<sup>272</sup> Being a commercial insurance policy, one supposes that it was not a short document; yet, length did not seemingly enter into the decision.

<sup>273</sup> The primary ground upon which the court rests its decision is the insured's lack of choice in an adhesion contract; the obvious purpose of the key language in the clause in question was to exclude "inside" burglaries — which clearly had not occurred with the insured's claim.

<sup>274</sup> 302 N.Y.S. 2d 390 (N.Y.C. Civ. Ct., 1969) (disclaimer of implied warranties; "non-insertion" clause).

<sup>275</sup> Such clauses can no longer benefit third parties in consumer transactions. See 16 C.F.R. §433. Cf. *Unico v. Owen*, 232 A. 2d 405 (N.J. 1967).

<sup>276</sup> Buyer agreed to pay \$14.87 per week, indicating income instability, low-paying employment, and hence, an educational barrier. Buyer, who also spoke only Spanish, did consult a lawyer, so he at least had common sense, whatever his educational achievements.

<sup>277</sup> Plaintiff, the assignee of the seller, repossessed Marciano's car after he had defaulted (presumably because the car was in need of repairs which seller refused to undertake) on his contract for \$1542. The price was \$1395; taxes, fees, and credit charges amounted to \$372, and buyer had made a down payment of \$219. Plaintiff, having advanced \$650 to seller (holding \$764 in reserve — a total of \$1414) resold the car to seller for \$348 within six months of the sale to Marciano — a fair indication of the wholesale worth of the car. The "repossession plus resale-at-wholesale = deficiency claim" syndrome is permitted by the UCC. See HERSBERGEN, "The Improvement Extension of Credit as an Unconscionable Contract," 23 *Drake L. Rev.* 225, 249-263 (1974). Thus, plaintiff had received \$750 (\$402 paid by buyer, plus \$348 on resale) on its outlay of \$650; seller had received \$1169 (\$650

“balloon” payment clauses, charges, and the right to “prepayment” and “acceleration-default” rebates could easily have been treated in a revision of La. C.C. arts. 2924-2925 (“of loan on interest”). Referral sales schemes are already a matter of La. C.C. arts. 1832, 1847, and possibly 1825. Credit information, discrimination in credit granting, and home solicitation sales are presently matters of federal coverage, but certainly could have been treated in appropriate portions of the Code. Regulation of debt collection, already a matter nicely covered by La.

from plaintiff, \$219 from Marcano and a \$300 second profit from the second retail sale at \$1050, less wholesale repossession — sale price of \$348; all on a defective car. That clearly stuck in the judicial craw.

<sup>278</sup> To the extent the car was known to be defective, buyer could not receive substantial benefits from it.

<sup>279</sup> See notes 276, 277, *supra*.

<sup>280</sup> 383 N.Y.S. 2d 535 (N.Y.C. Civ. Ct. 1976) (liability for full contract price on default).

<sup>281</sup> The defendant had agreed to cater a wedding which was called off four months prior to the scheduled date. Defendant not only wanted to keep the plaintiff's \$750 deposit, it wanted the remainder of the \$1550 agreed price pursuant to a clause in the contract, in fine print. The court labelled the clause a “penalty” clause, not a liquidated damages provision, which would have provided an alternative holding. Cf. *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S. 2d 268 (N.Y. Civ. Ct. 1973).

<sup>282</sup> 340 N.Y.S. 2d 268 (N.Y. Civ. Ct. 1973) (dicta) (liability for full contract price on cancellation).

<sup>283</sup> 340 N.Y.S. 2d 268 (N.Y. Civ. Ct. 1973) (dicta). The case was not decided on the basis of §2-302, but is virtually indistinguishable on the facts from *Bogatz*, *id.* Defendant contracted for 190 half-hour reducing sessions, at a price of \$300, payable in 10 monthly installments of \$30. Though the contract clearly said that the sessions were not refundable or cancellable, plaintiff allegedly told defendant that she could discontinue at any time — neglecting to mention, of course, that if she did so, she'd still be liable for the \$300. Defendant sought to cancel on the same day. The case was decided on the labelling of the clause in question as a “penalty” rather than a liquidated damages clause, the court adding, however, the public policy notion that it is unconscionable to place a contractant in a better position upon breach by the other party, than he would have been in had that party fully performed.

<sup>284</sup> *Id.*

<sup>285</sup> 208 S.E. 2d 321 (Ga. App. 1974) (disclaimer of implied warranties).

<sup>286</sup> The case could have been decided on the basis of an ineffective disclaimer of warranty, delivered to buyer at the moment the car was delivered. See *Prince v. Paretti Pontiac, Inc.*, 281 So. 2d 112 (La. 1973). The case, however, does fit the mold of §2-302 in that, prior to the delivery of the disclaimer, buyer clearly did have the implied warranties, so that it would be very unfairly surprising to him to find out that no such warranty existed after all.

<sup>287</sup> 291 A. 2d 298 (Dela. Super. 1971) (confession of judgment).

<sup>288</sup> The case is decided on the basis of unfair surprise: confession of judgment was permissible in Delaware, but the opinion indicates that the provision must be so placed as to draw special attention, and small print won't do it.

<sup>289</sup> 275 A. 2d 154 (N.J. Super. 1971) (non-assertion of claims and defenses against third-parties; buyer to bear risk of loss of personal property on repossession).

<sup>290</sup> The agreement not to assert defenses was in very small print, and the clause was unenforceable in New Jersey under *Unico v. Owen*, *supra* n. 275. Additionally, the clause placing the risk of loss on buyer amounted to an invalid security interest in personal property.

<sup>291</sup> 338 N.Y.S. 2d 67 (N.Y.C. Civ. Ct., 1972) (forfeiture of deposit on cancellation).

<sup>292</sup> The lease contained 10 000 words, many of which were incomprehensible; 54 clauses in all, and 4 pages long.

<sup>293</sup> The court ruled that a landlord — any landlord — is under an affirmative duty to bring clauses such as deposit forfeiture to the attention of the prospective lessee and to explain the meaning thereof prior to asking lessee to execute the lease.



C.C. art. 2315, is now also regulated (as to "debt collection agencies") by federal law. Provisions as to credit insurance, perhaps, appropriately should remain as a Civil Code ancillary.

Accordingly, one can well question the need for, and certainly the effect of, the 1972 legislation.

<sup>294</sup> 371 N.Y.S. 2d 289 (N.Y.C. Civ. Ct., 1975) (buyer's default caused by seller's failure to explain payment terms).

<sup>295</sup> Buyer spoke no English.

<sup>296</sup> Jimenez is one of the few cases in which a buyer, with a language handicap, actually requested an explanation and/or translation of the contract. The request was not honored.

<sup>297</sup> Seller apparently was able to enlist the aid of buyer's tenants in inducing the sale.

<sup>298</sup> 276 N.E. 2d 144 (Ind. 1971) ("hold harmless" clause).

<sup>299</sup> The "probable" entry is based on an educated guess as to the contract form employed by American. There is little doubt that Weaver did not understand the full import of what he was executing, in view of his limited education.

<sup>300</sup> Johnson was described as "practically illiterate".

<sup>301</sup> No true deception appears in the case, though the mere ceremonious approach of American's representative effectively glosses over a rather significant bit of contractual language. See text accompanying notes 344-348.

<sup>302</sup> The impression cannot be avoided that the Weaver case has made an important public policy decision in Indiana: if the contract is so complicated, or onesided that the layman needs a lawyer to protect his interests, the party in the superior bargaining position must either advise him to obtain legal assistance, or make a meaningful, clear and unbiased explanation of the terms of the contract prior to execution thereof. Cf. Seabrook, *supra* notes 291, 293.

<sup>303</sup> 415 F. Supp. 264 (E.D. Mich. 1976) (exclusion of consequential damages).

<sup>304</sup> *Supra*; The comments in note 299, *supra*, are also a propos.

<sup>305</sup> 201 A. 2d 886 (N.H. 1964) (no disclosure of interest rate).

<sup>306</sup> Buyer had paid \$1609 toward the total time price of \$2568, for virtual non-performance. MacIver may be categorized as a "price unconscionability" case as opposed to a case of non-performance by the seller, because of the price of \$1759 represented a disparity of about \$800 over valuation. Seller, of course, categorized that as a "commission."

<sup>307</sup> After buyer signed in blank, seller then added \$809 over the agreed price of \$1759, the monthly payment amounts having been filled in as \$42.81.

<sup>308</sup> The result in the case seems to represent a pure dosage of equity.

<sup>309</sup> 247 A. 2d 701 (N.J. Super. 1968) (price was  $2\frac{2}{3}$  times value).

<sup>310</sup> Buyers signed three forms: a "food plan" contract, an installment contract for a freezer (they were led to believe was included in the price of the food plan contract) and an application for financing. The food plan contract was so placed that only the signature lines of the bottom two documents were visible.

<sup>311</sup> In view of the circumstances, as outlined in n., 310, *id.*, bargaining over terms is not likely to have occurred.

<sup>312</sup> In view of the circumstances, as obtained in n. 310 *supra*, high pressure sales tactics is a virtual certainty.

<sup>313</sup> 298 N.Y.S. 2d 264 (Sup. Ct. 1969) (price was three times value).

<sup>314</sup> Buyers were welfare recipients, of whom the court said the seller took "knowing" advantage.

<sup>315</sup> Buyers agreed to pay \$1235, yet seller knew buyers were welfare recipients. On the other hand, buyers did in fact pay slightly more than one-half the agreed amount, though not without incurring substantial late payment charges.

<sup>316</sup> 281 N.Y.S. 2d 924, lower court op. at 274 N.Y.S. 2d 757 (Sup. Ct. 1967) (price was about  $2\frac{1}{2}$  times wholesale cost).

VI. — INTEGRATION OF SEPARATION:  
SOME CONCLUSIONS AS TO CODE REVISION IN LOUISIANA.

The Louisiana judiciary has constructed the beginning of a dual standard by which to apply the provisions of the Civil Code, to the end that consumer transactions are to be distinguished from commercial transactions. This conclusion will be amply supported by a case law analysis in the final version of the research of which this report is but a summary. Accordingly, the Louisiana experience is such that *integration* of consumer-protective notions, rather than separation, is thought to be the appropriate approach.

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<sup>317</sup> A referral scheme was employed to induce buyer to enter into the "agreement;" buyer was told that the freezer "won't really cost you anything" because of \$25 commissions to be earned on all sales made to friends and neighbors. Such ploys are forbidden in Louisiana. See La. R. S. 9: 3536.

<sup>318</sup> Buyer, who spoke only Spanish, told the salesman that he had but one week left on his job and "didn't think he could afford" the freezer. He was right, as it developed.

<sup>319</sup> 274 A. 2d 78 (N.J. Super. 1970) (price was about 2½ times reasonable retail).

<sup>320</sup> Buyers subsequently sought, and qualified for, welfare assistance, from which the inference as to educational attainment derives.

<sup>321</sup> The Comments made in n. 320, *id.*, also provide basis for inferences as to ability to repay, although it is not indicated whether seller was aware of that ability.

<sup>322</sup> 275 N.Y.S. 2d 303 (Sup. Ct. 1966) (price was about 2½ times reasonable retail).

<sup>323</sup> Sellers used a referral sales scheme of the "pyramid" or "endless chain" variety, did not disclose to each prospective buyer his respective standing in the geometric progression of the "pyramid" sales scheme, and engaged in various other deceptive acts and practices including the use of "sewer service." Cf., *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W. 2d 624 (Iowa 1971).

<sup>324</sup> When asked to leave or return at a later time, sales representatives told buyers "it's now or never."

<sup>325</sup> Sellers using an endless chain sales scheme must be held to know that buyers near the bottom of the "pyramid" cannot possibly benefit therefrom; on the other hand, the goods which are incidental to the scheme may be simply misrepresented as to quality, but usable in fact, nevertheless. In only two instances did buyers earn enough in commissions to pay for the products purchased, and seller did not pay commissions actually earned in most cases.

<sup>326</sup> Seller obtained numerous default judgments, indicating either low quality goods for which buyers refused to pay, or an inability to pay.

<sup>327</sup> 279 A. 2d 640 (N.J. 1971) (price was about 2½ times maximum retail; value virtually "nil").

<sup>328</sup> Seller consciously directed its "pitch" to minority groups in urban areas, favoring persons with incomes of less than \$5000 per year (circa 1965). The court found that the buyers typically were incapable of understanding what they were doing.

<sup>329</sup> The court found no "fraud per se" under the *New Jersey Consumer Fraud Law*, but the seller's representatives did make several misrepresentations, including as to price, achievability of high school equivalency diploma, and cancellation of the contract. In *State v. Koscot*, *supra* n. 323, a similar case, fraud was found.

<sup>330</sup> The court found that the "educational" book package had little or no educational value for the children in the age group and socioeconomic position seller represented would be benefited.

<sup>331</sup> As observed in n. 328, *supra*, seller consciously aimed at low income, urban minority families; in addition, 779 collection actions were found found to have been filed between 1964 and 1968, of which 628 resulted in judgment against the buyer.

<sup>332</sup> 171 N.W. 2d 689 (Mich. App. 1969).

<sup>333</sup> In view of the legally sanctioned status of the clause in question, and of the lack of "procedural" factors such as deception, the case can only stand for the proposition that purchasers

In terms of the revision process itself, several alternatives are available. These alternatives, which will be analyzed in greater detail in the final report of the research (and which are not mutually exclusive), are:

1. preservation of the status quo
2. revision to eliminate inconsistency between the Code and the federal law
3. revision to fully establish a delineation between consumer transactions (of all types) and commercial transactions
4. revision to fully recapture the initiative so clearly embodied in the spirit of the Code, whereby justice on a humanistic level can be administered

who sign contracts of adhesion in order to secure goods or services not available elsewhere on better terms will not be presumed to have given their consent freely and deliberately to one-sided terms unreasonably favorable to the other, and more powerful, party. As such, the case exemplifies the reference in UCC §2-302, Comment 1 to "oppression."

<sup>334</sup> 350 F. 2d 445 (D.C. Civ. 1965) (dicta) (cross-collateral payment allocation). The Williams case, as well as the cases numbered 32 through 43, are listed in Comments to UCC §2-302 or U3C §5.108 as cases illustrative of prior application of the doctrine of unconscionability.

<sup>335</sup> The opinion describes buyer as a person of limited education.

<sup>336</sup> Seller knew that buyer was separated from her husband and was supporting her seven children on public assistance of \$218 per month; knew she had an unpaid balance in her account of \$164, and still sold her a \$515 stereo.

<sup>337</sup> 161 A. 2d 69 (N.J. 1960) (dicta) (disclaimer of implied warranties).

<sup>338</sup> The court states, at pp. 92-93, of 161 A. 2d:

Assuming that\*\*\* [buyer] should be charged with awareness of [the warranty] language, can it be said that an ordinary layman would realize what he was relinquishing in return for what he was being granted?\*\*\* Any ordinary layman of reasonable intelligence, looking at the paraphraseology, might well conclude that Chrysler was agreeing to replace defective parts.... during the first 90 days or 4000 miles of operation, but that he would not be entitled to a new car\*\*\* In the context of this warranty, only the abandonment of all sense of justice would permit us to hold that.... [the language]\*\*\* signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile.

<sup>339</sup> The New Jersey Supreme Court incorporated a dissertation on "public policy," and the holding itself is nothing short of a civil indictment, not of the seller or the manufacturer, but of the entire automobile industry and its marketing approach.

<sup>340</sup> 232 A. 2d 405 (N.J. 1967) ("non-assertion" clause).

<sup>341</sup> The case is simply one of the classic "holder in due course versus the consumer" variety with the defense of non-performance by seller allegedly "cut off" by the status of the holder in due course. The court's ruling would not have been necessary had the seller been the plaintiff.

<sup>342</sup> 47 T.L.R. 336 (1931 C.A.) (non-rejection clause).

<sup>343</sup> 140 N.E. 118 (Ohio 1922) (disclaimer of implied warranties).

<sup>344</sup> Seller advertised certain "high-grade used trucks," categorizing such as being "practically a new truck as far as wearing qualities and operating efficiency is concerned." Yet, the buyer signed a contract form which expressly waived "all promises, verbal understandings or agreements of any kind.... not specified herein."

<sup>345</sup> *Id.*

<sup>346</sup> The opinion expressly recognizes that the result obtained is a substantial modification of the caveat emptor philosophy, as to which the court in no manner seeks to hide its disdain. 140 N.E. at 121.

<sup>347</sup> 144 S.E. 327 (Ga. App. 1928) (disclaimer of implied warranties).

<sup>348</sup> The seller's disclaimer clause stated that "no warranties have been made by the seller unless indorsed hereon in writing". The court pointed out that sellers do not "make" those warranties

*Elaboration.* By “preservation of the status quo” is meant, codification of the jurisprudence which has long distinguished between transactions which involve parties on a somewhat equal footing, and those which plainly do not. The technique of *examples* must be well-suited for this purpose, and the focus of revision would be in the areas of consent and quality expectation, primarily. Thus, the implied warranty of “workmanlike” performance of contracts for services, currently a jurisprudential creature, would be treated much as the seller’s implied warranty against redhibitory vices. Any codal provisions affected by federal law could be subjected to a revision, of the “house cleaning” variety.

The alternative denominated above as “3” would simply extend, by analogy, the (primarily sales) jurisprudence-codification approach into the areas of leases, loans, contracts for services, and so on. Thus, the duty of a seller to “explain himself fully respecting the extent of his objections,” and, indeed, the very nature of these obligations, would be imposed and expressly announced in the cases of lessors, suppliers of service, lenders, and real estate and insurance brokers.

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implied by law, and that the attempted disclaimer could not reasonably be taken to refer to implied warranties.

<sup>349</sup> *Id.*

<sup>350</sup> 216 N.W. 790 (Minn. 1927) (disclaimer of implied warranties).

<sup>351</sup> Seller attempted to disclaim warranties in the manner of the seller in the *Hardy* case. See n. 348, *supra*.

<sup>352</sup> See notes 348, 349, *supra*.

<sup>353</sup> 164 Pac. 273 (Kan. 1917) (extension of delivery dates).

<sup>354</sup> 73 P. 2d 1272 (Utah 1937) (time limit on claims).

<sup>355</sup> The opinion refused to permit a catsup seller’s clause providing that all claims must be made within ten days of receipt to apply to a claim pertaining to mold discoverable only by microscopic examination; such a result would, said the court, be manifestly unfair. 73 P. 2d at 1275.

<sup>356</sup> 189 N.W. 815 (Iowa 1922) (extension of delivery dates).

<sup>357</sup> Into a space of about five by eight inches was crowded some 4000 words in small type. 189 N.W. at 820.

<sup>358</sup> Buyer’s eyesight problems prevented him from reading and seller’s agent admitted that he had not read the contract to buyer, and that buyer had not read it in the presence of the agent before signing it. 189 N.W. at 821.

<sup>359</sup> Buyer alleged that seller’s agent had represented that the flour purchased would be “old wheat flour,” and that if buyer be dissatisfied he could refuse further shipments. Additionally, buyer alleged that provisions of the printed form were at no point even mentioned to him. 189 N.W. at 820.

<sup>360</sup> 209 Pac. 131 (Ore. 1922) (refund as exclusive remedy).

<sup>361</sup> The machine delivered to buyer failed in substantial particulars to correspond to the contract description; that it did not have the warranted capacity was apparent, without any testing. 209 Pac. at 135.

<sup>362</sup> The court refused to permit a “limitation of remedies to return” provision apply where seller had failed to deliver the thing described.

<sup>363</sup> 1 K.B. 17 (1934 C.A.) (disclaimer of implied warranties).

<sup>364</sup> Vendor sold as “new” a car previously let out on “trial” to another, who had driven it over 500 miles.

<sup>365</sup> 2 K.B. 312 (1930) (disclaimer of implied warranties).

<sup>366</sup> The cases in Table 14 are listed without footnotes to citations, but the cases are listed the same as in Table 13, which may be consulted for case citations.

Finally, perhaps the time has come for a full-blown revision of the Codal articles which touch on any phase of consumer transactions. For example, an analysis ought to be made of redhibition as a protection of quality expectations among Louisiana consumer-buyers. Some thought must also address the problem of adhesion contracts. In short, there may be a need for a complete revision aimed at recapturing the status enjoyed by the Civil Code *vis-à-vis* the common law, at the time the latter system was burdened by *caveat emptor*.