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CONSUMER PROTECTION AND THE CIVIL CODE: LOUISIANA PERSPECTIVE

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The question is warranted whether consumer law is a new kind of law — whether a new region is emerging into the legal world with all the force of a geological eruption.

In retrospect, it would seem that the kind of problem that law is designed to solve was already accounted for in traditional legal systems. Thus, where the community is governed by a civil code, the buyer of a defective thing can obtain redress through redhibition.[1] The recipient of unsatisfactory services can get relief on ground of breach of the peculiar kind of lease he had entered with the purveyor of such services.[2] If the purchaser of the defective thing and the disappointed obligee of services are regarded as consumers, the conclusion seems inescapable that traditional law cared for their interest, at least to some extent.

As always, however, traditional law is challenged by social, political and economic changes. Rules that are practical and fair for the social group through certain stages of its development may no longer be as effective once the dynamics of change within the group are considerably altered. The fact is that Western economy is now a consumer economy.[3] Contemporary patterns of production and distribution of goods, coupled with the increasingly important phenomenon of commercial advertising, have created the need to consume in order to maintain a certain economic, and therefore political structure. Until not long ago, the legal order provided adequate protection for persons who were occasional buyers or occasional users of services. That protection does not seem to be sufficient when everybody must buy things and must avail himself of services at a greatly increased frequency because adjustment to the new ways of life prevailing in the social group can be attained only through such transactions.

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[1] See French Civil Code, art. 1641; Quebec Civil Code, art. 1522 and Louisiana Civil Code, art. 2520.

[2] Louisiana Civil Code, art. 2769 provides: "If the undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract."

[3] See opening speech by André DE CAMBIAIRE in *The Judicial and Quasi-Judicial Means of Consumer Protection, Symposium*, 15 (1976).

Thus, every member of a modern society has become a consumer. Moreover, the preservation of certain structures practically imposes upon every member of a modern society a virtual duty to consume. If that is so, protection for parties who only occasionnally make transactions of a certain kind is no longer enough. To consume has become a veritable expression of social life. Consumer protection is then protection afforded to a new aspect of a person's life rather than protection afforded to that person as a party to an isolated transaction.

The emergence of consumer law, rather than a process of creation within the law, is a process of awareness and specialization. It is not the first time that social, political and economic change has forced the law to admit a new province into its already vast territory. In the wake of industrial revolution labor law was carved out of traditional rules of master and servant and lease of labor.[4] Because of the expansion of capitalist economy, a need arose to control some unwanted consequences and the law of public utilities came into existence in the form of a very detailed regulation of contracts for certain services.[5] Those are just two examples in a list of legal developments to which consumer law must now be added. All such developments, through exploration in depth and through expansion of the scope of certain principles, ultimately turn a few established ideas into a new area of the law that appears as a legislative response to social demands based on change.

A civil code is not all the law in force in a particular jurisdiction at a particular time. A civil code has a coverage of its own determined by tradition.[6] New areas of the law cannot be incorporated in full into a civil code without destroying both its nature and its structure. Yet, if a civil code is not to remain impervious to change, it must preserve a degree of flexibility that makes it responsive to social evolution. The preservation of such flexibility is, precisely, the main purpose of code revision.

Like Quebec, Louisiana has been involved for many years in the process of revising its civil code. No full Projet of the Louisiana Civil Code has yet been completed, but the book on property has been revised and the new articles have been enacted by the Louisiana Legislature.[7] Though not yet approved by the Council of the Louisiana State Law Institute, there is a projet of the book on obligations. Some of the draft articles in that projet clarify traditional principles in such a manner as to enhance compatibility between the new Louisiana Civil Code and present-day solutions to consumer problems.

Since the legal step a person takes to become a consumer is making a contract, a realistic regulation of vices of consent can furnish solid grounds for protection of the consumer. Along such lines, one of the draft articles asserts that:

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[4] See CAMERLYNCK et LYON-CAEN, *Droit du travail*, 4-5 (1976); see also preface by Jeanneney to BRUN, *La jurisprudence en Droit du Travail Grands Arrêts*, V-VIII (1967).

[5] See POND, *A Treatise on the Law of Public Utilities*, 1-2 (1932).

[6] See MERRYMAN, *The Civil Law Tradition*, 27-34 (1969).

[7] See Louisiana Acts, 1978 No. 728.

Fraud may result also from silence or concealment.

Properly applied, that rule provides a remedy for anyone disappointed or deceived because the other party omitted explanations or clarifications that the circumstances called for.

Another article on the same subject provides that:

> An unjustifiable opinion about quality, value, authenticity, or similar matters, or about the existence of a fact, may constitute fraud when, because of a relation of trust and confidence, the party is induced to rely on it.

Since confidence cannot be excluded from a business relationship, this rule can be instrumental in achieving a high standard of honesty in consumer transactions.

A complement to the preceding articles provides that:

> A party against whom rescission is granted on grounds of fraud is also liable for damages.

Concerning another vice of consent, the traditional rules on violence or threats have been expanded. As formulated in a draft article on that matter:

> Rescission may be obtained on the grounds of duress when, because of need or inexperience known to the other, a party has agreed to render a performance that is manifestly out of proportion to the performance of the other party.

When, as the result of technological advance, things are placed on the market that either are entirely new or are largely revised or modified versions of things that previously existed, a consumer's lack of experience, owing to his unfamiliarity with the things, is a frequent cause of disappointment and even deception, since such lack of experience is often counted on by market operators and turned to their advantage. The proposed rule will allow a proper response to such practices. A complement to the rule provides:

> The party against whom rescission is sought on such grounds may prevent it by offering to improve his performance, or to reduce his advantage, to the satisfaction of the other party or of the court.

According to a further complement:

> The party against whom rescission is granted on grounds of duress is also liable for damages.

Unlike the Civil Code of Quebec, the provisions on lesion in the Louisiana Civil Code protect persons of legal age and not only minors, although where persons of age are involved, the protection is confined to partitions and to sales of immovable property in favor of the vendor alone.[8] The reporter was instructed to preserve the institution of lesion and to expand its scope. As a result, one of the draft articles reads:

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[8] See Quebec Civil Code, arts. 1001-1012 and Louisiana Civil Code, arts. 1860-1880.

> Rescission may be obtained on grounds of lesion when, under circumstances indicating the lack of a free consent, a party has agreed to render a performance that is manifestly out of proportion to the performance of the other party. The party against whom rescission is granted on grounds of lesion may prevent it by offering to improve his performance.[9]

Defined in terms so broad, the ancient notion of lesion may become a useful means to prevent the unfair results of abusive practices.

Since the revision of 1825, the Louisiana Civil Code has contained a definition of cause.[10] Unlike the Projet Quebecois, the draft Louisiana articles on obligations will preserve the notion of cause as a requirement for contract formation. The reporter was instructed to recommend a new definition of cause that would distinguish it from consideration as clearly as possible and would also introduce the concept of detrimental reliance as an alternative ground for enforceability. Conforming to those instructions the pertinent draft article reads:

> Cause is the reason that makes an obligation enforceable. Such cause need not be anything given to the obligor by the obligee. One party's reasonable reliance on a promise by the other may be valid cause for an obligation of the other if the latter knew or should have known that his promise could induce the former party to rely on it to his detriment.

That article is to be inserted after a restatement of the traditional principle according to which an obligation without a cause, or an obligation whose cause is unlawful, can have no effect.[11]

Louisiana courts have made frequent use of the notion of *cause illicite* to relieve an obligor when the contract gives the other party advantages so excessive as to give rise to a suspicion of imposition or immorality.[12] The new definition of cause lends further support to that jurisprudential trend. Only good results are to be expected from such an approach in the fight for fairer consumer transactions.[13]

A civil code can be fashioned in a manner that will make it responsive to new problems, but the true task of a civil code is to formulate the principles on which ultimate solutions can rest. The formulation of solutions per se, insofar as they may depend on a matter of minute detail, escapes the purview of such a code. Traditionnally, matters of detail that can vary greatly within a short time or between places separated by a short distance have been left to the commercial law. A glance at the Quebec Draft Consumer Protection Act suffices to suggest the

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[9] *Cf.* Quebec Draft Civil Code, Obligations, art. 37.

[10] Louisiana Civil Code, art. 1896: "By the cause of the contract, in this section, is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made." *Cf.* Quebec Civil Code, arts. 989-990.

[11] See Quebec Civil Code, art. 989 and Louisiana Civil Code, art. 1893.

[12] See *Ekman* v. *Vallery*, 185 La. 488, 169 So. 521 (1936).

[13] In American jurisdictions where the Uniform Commercial Code has been introduced, comparable results may be achieved through the concept of unconscionability contained in §2-302. For a good example of the use of the unconscionability concept for consumer protection purposes see *Kugler* v. *Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

thought that the commercial law, as distinct from the civil law in a proper sense, may be undergoing a renaissance after a twilight of three quarters of a century.[14]

In a different perspective, it is clear that the consumer is clamoring for procedural solutions to his plight. A magnificent armory of substantive remedies is of little help if the relief thus afforded can be obtained only after long and costly litigation.[15] Further, when the thing he bought does not work properly, the consumer is not so much concerned with a remedy for his injured interest as he is concerned with a system that will make things work. In other words, the consumer wants the principle that contracts must be performed in good faith made a reality rather than a mere conceptual background against which a sanction is determined. He would favor prevention over compensation.[16] New instrumentalities, some very ingenious, have been created in different places to meet those demands. A municipal system of legal cost-insurance has proved highly sucessful in the German city of Bremen.[17] A conciliation board for the auto-repairers trade has so far given considerable satisfaction to the owners of allegedly repaired automobiles in Hamburg.[18] A similar arbitration board settles claims from disappointed customers of dry-cleaners in Switzerland.[19]

The civil code is not the right place to provide that kind of device. It suffices if nothing in the civil code is opposed to solution-oriented creativity.

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[14] See TUNC, *Colloques internationaux du Centre national de la recherche scientifique*, "L'unification interne du droit privé" (1953); FRÉDÉRICQ, "L'unification du droit civil et du droit commercial: essai de solution pragmatique," 15 *Revue trimestrielle de droit commercial*, 203 (1962); LITVINOFF. A Review of Kozolchyk and Torrealba, "Curso de derecho mercantil," 17 *Arizona Law Review*, 1167 (1975). See also *Louisiana Consumer Credit Statute*, R.S. 9: 3519 and *Louisiana Consumer Protection Statute*, R.S. 51-1401-1512. *Cf. Quebec Draft Consumer Protection Act*.

[15] See BIHL, "The Consumer and the Cost of Justice," in *The Judicial and Quasi-Judicial Means of Consumer Protection, A Symposium*, 31-33 (1976).

[16] For a full discussion of prevention, compensation and sanction as the three main aspects of consumer protection problems see Consolidated Report by PERROT in *The Judicial and Quasi-Judicial Means of Consumer Protection, A Symposium*, 285-298 (1976).

[17] See BIHL, "The Consumer and the Cost of Justice," in *The Judicial and Quasi-Judicial Means of Consumer Protection, A Symposium*, 37 (1976).

[18] See VON HIPPEL, "Comparative Study of Means of Consumer Protection Both In and Out of Court," in *The Judicial and Quasi-Judicial Means of Consumer Protection, A Symposium*, 275 (1976).

[19] VON HIPPEL, *Op. cit.* at 277. In the city of Washington consumers benefit from the operation of a Neighborhood Consumer Information Center by faculty and students of the Howard University Law School. That center publishes a bulletin titled "Buyer Beware." Class actions is another important development that must be considered in the same context; for a European example see the *French Royer Act* of 1973 allowing associations to bring action in behalf of their members provided that such associations are recognized and have at least 10 000 members.