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George L. Bilbe

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Thème II
VICES DE CONSENTEMENT ET EXPLOITATION: ALTERNATIVE OU CUMUL

"CONSENT AND UNCONSCIONABILITY"

by George L. BILBE,
Associate Professor of Law,
Loyola University, Louisiana.

This morning's topic indicates that participants might appropriately consider the extent to which problems often addressed in terms of "unconscionability" or "exploitation" might be resolved through traditional notions of vices of consent. In my view, if a party reluctantly signs a "contract" document he understands because of the absence of opportunities for more advantageous transactions, his responsibility should not depend upon inquiry as to whether his consent was "free." Thus, when some requisite level of understanding of the provisions of a document is reached, I believe that the terms of the document should define the legal relationship unless traditional notions of public order or emerging concepts of unconscionability or exploitation indicate that the dominant party should not be permitted to dictate certain of the terms he desires. Further, even when a party has not read the terms of a contract document, he, by signing, should be charged with an awareness of at least the customary or reasonably expectable provisions. However, when a form document contains provisions which would not reasonably be anticipated by the party whose signature is sought, it would not be unreasonable, at least in consumer transactions, to rule that the party's signature does not in itself establish his awareness of the unanticipated provisions. In the upcoming discussion, I will describe one group of Louisiana appellate decisions in which the courts have arguably taken such an approach. I will also refer to both existing and proposed Québec legislation which may provide basis for a similar analysis. Thereafter, the Louisiana legislation addressing "unconscionable" transactions, its Québec counterparts and some additional "mandatory" provisions of Québec law will be discussed.

The Louisiana decisions casting doubt on the significance of a signature on an unread document almost all involve endeavors of automobile vendors to avoid responsibility for redhibitory defects in vehicles they have sold. Under Louisiana Civil Code article 1764, parties to a sale, like parties regulated by your Code

articles 1507 and 1524, may agree that the vendor will bear no responsibility if the goods should be defective. Particularly in the case of professional vendors, the courts have long viewed these agreements unfavorably. Thus, for example, the buyer of a used car sold "as is" has in several instances been found entitled to rescind the sale because the vehicle had significant deficiences.[1] Further, in several recent appellate decisions involving vehicles the courts have required that language designed to relieve the vendor of responsibility in redhibition be "clear and unambiguous" and have been "brought to the purchaser's attention or explained to him."[2] These decisions, in all probability, are based in part on a belief that professional vendors, as a matter of public order, should not be permitted to avoid a vendor's responsibility. For that reason, the Louisiana courts may be disinclined to expand the instances in which a party who signs a document will not be found to have consented to its terms. However, it is possible that these decisions signal a judicial awareness that "consumers" frequently do not read or do not understand the forms they sign in transactions with merchants. In any event, the decisions involving automobiles could readily be extended to other instances where professionals seek to avoid a responsibility which otherwise would be recognized under Louisiana suppletive law.

As I understand Québec law, there is presently room for a similar development in the case of contracts regulated by your *Consumer Protection Act* of 1971. Section 5 of that enactment requires that a "merchant must sign the writing [utilized in the transaction] ... and give it to the consumer, and grant him a sufficient delay to enable him to become aware of its terms and scope before signing it." Further, section 104 permits "[e] very consumer" to "make proof by testimony, even to contradict or vary the terms of a writing," when the "act has not been complied with." Thus, if a consumer seeks to uphold a transaction regulated by this enactment but nonetheless asserts the transaction to be unaffected by certain of the provisions contained in a document he has signed, these sections indicate that the presence of his signature is in itself no obstacle to the recognition of the requested relief. Despite the consumer's signature, it appears necessary to determine whether the merchant afforded the consumer an opportunity to "become aware" of the document's terms. Further, it would be possible to conclude that "delay" alone is insufficient basis for attaining understanding of every species of disadvantageous provision. In any event, section 5 clearly limits the significance of a signature in establishing the terms of a contractual arrangement, and section 22 of the 1977 Draft Bill of a new *Consumer Protection Act* retains the substance of present section 5.

The 1971 act contains other interesting provisions concerning the effectiveness of endeavors of merchants to define the terms of contractual relationships. Section 63, for instance, addresses attempts to limit responsibility and provides

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[1] *See, e.g., Hendricks* v. *Horseless Carriage, Inc.*, 332 So. 2d 892 (La. App. 2d Cir. 1976).

[2] Perhaps the most notable decision is *Anderson* v. *Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973), *writs refused*, 294 So. 2d 829 (La. 1974).

that "[e]very partial exclusion of warranty shall be deemed not written in a contract when the matters covered and those excluded by such warranty *are not clearly indicated in separate and successive clauses*."[3] (Emphasis supplied). Thus, this provision indicates that any attempt to limit responsibility otherwise imposed by suppletive law must be readily discernible. The enactment contains yet another provision bearing on the significance of a writing in defining a merchant's responsibility. Section 61 concerns the buyer who "requires goods for a specific purpose." The section provides that the merchant "must," at "the request of the consumer," indicate that the goods are fit for the purpose for which they are sold and that the contract in "such a case... shall be deemed to contain a clause warranting that such goods may be normally used for the purpose indicated." This provision is fine for those cases where merchants include such a written indication of fitness. However, the provision is troublesome as it fails to expressly address the admissibility of testimony concerning the occurrence of an oral warranty in situations where a document signed by the buyer either fails to mention such a warranty or negates any such occurrence. Section 36 of the 1977 proposal, however, would apparently permit the introduction of testimonial evidence of such a warranty in either of these situations. On the other hand. Article 1234 of the Québec Civil Code and article 69 of the Evidence Book of the Draft Civil Code would probably be interpreted to exclude such testimony.

I personally am intrigued by contemporary efforts to define the role of form instruments in identifying the terms by which bargain transactions are to be regulated. Because provisions on form documents so often are unread and because they frequently present difficulties for those who do examine them, it is reasonable to limit the role of form documents in defining responsibilities in consumer transactions. In particular, if a merchant desires to supplant significant provisions of suppletive law, it is rational to require him to make a reasonable effort to call the desired provisions to the consumer's attention. Further, it is realistic to recognize that a written statement negating the occurence of additional warranties is not conclusive proof that such warranties were not made. Hence, the previously discussed provisions, in my opinion, are desirable as they facilitate efforts to demonstrate how transactions actually occurred. Further, the provisions limiting the significance of written terms are directed to transactions in which merchants have not reasonably evidenced their desire to incorporate terms which the consumer might find objectionable. Thus, these provisions hold open the possibility that merchants may successfully include such terms by clearly emphasizing their desire to do so.

Turning to "unconscionability" and "exploitation," certain Louisiana legislation may be of interest. In 1972, the legislature enacted provisions providing for relief from "unconscionable" provisions in "consumer credit transactions." Under this legislation, a contract or clause of a contract "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

[3] Section 38 of the 1977 proposal contains a similar provision.

consent to the contract or clause thereof in question."[4] If such unconscionability is found to exist, "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."[5] Somewhat surprisingly, there has been no reported appellate case construing the statute. In all probability, the absence of such litigation is attributable to the statute's limited sphere of application.[6] Further, a creditor whose practices have been found unconscionable is apt to have engaged in like practices in other instances and would for that reason be unlikely to risk the publicity which would result from the affirmance of the lower court's decision. In any event, we have no judicial experience concerning this statute. Decisions construing similar statutes enacted throughout the United States, however, are available for your consideration,[7] but, without reference to these decisions, several observations may be made. The Louisiana statute, like your existing and proposed exploitation statutes, does not precisely identify situations in which judicial intervention is appropriate. Nonetheless, the formulation is quite significant as it seemingly addresses all products of unequal bargaining power and not simply disparity in the value of prestations. Thus, for example, it might be utilized to afford relief from provisions permitting creditors to accelerate indebtedness in the case of minor delinquency in making deferred payments.[8] Section 118 of your 1971 *Consumer Protection Act* and particularly article 37 of the Obligations Book of your Draft Civil Code, on the other hand, may be limited to complaints based simply on disparity in economic values as determined at the time the transaction is entered. Thus, it could be argued that complaints based upon "oppressive" creditor remedies, provisions applicable only in case of delinquency in payment, do not seriously affect the value of prestations and for that reason are not subject to adjustment under these provisions. Section 6 of the 1977 proposal, however, is perhaps as broad as the Louisiana formulation. Of course, such arguably oppressive features are always subject to scrutiny under traditional "public order" provisions such as article 8 of the Obligations Book of the Draft Civil Code. This, however, brings me to my concluding observation. Unconscionability and exploitation provisions are written in general terms so that the products of extremely disparate bargaining power can be adjusted. However, such broad brush provisions do not guarantee particular judicial results. Thus, when there is a desire to eliminate a particular practice or to permit another, precise legislation is in

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[4] La. R.S. 9: 3516 (29).

[5] La. R.S. 9: 3551.

[6] The statute, for instance, does not affect sales of motor vehicles or immovable property. *See* La. R.S. 9: 3516 (10).

[7] The Louisiana statute is patterned after Uniform Consumer Credit Code section 5.108, a provision of a proposed model enactment approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. This provision was derived in significant part from Uniform Commercial Code section 2-302, a provision enacted by all of the United States except Louisiana.

[8] The 1971 *Québec Consumer Protection Act*, in sections 67-71, provides precise regulation for such provisions.

order. Accordingly, the 1971 *Consumer Protection Act* takes a sound approach in dealing expressly with such matters as the right to prepay loans, the availability of the holder in due course concept, and the rights of the defaulting buyer in installment sales. Similarly, it is appropriate, during legislative revision, to define the extent to which a vendor or provider of services can contractually limit the responsibility which he otherwise would incur, and this matter has been addressed in both the Draft Civil Code and the 1977 *Consumer Protection Act*. Such specific provisions, not general unconscionability or exploitation provisions, should be the primary means of regulating consumer transactions.