Redhibition, Implied Warranties, and Waivers in Louisiana: A Problematic Area

Nadia E. Nedzel*

In a common-law world that has apparently turned its back on consumer protection because of mass-produced internet-and-technology driven commerce, it is time for mixed-civilians to refocus on consumer needs. The purpose of redhibition is and has always been to provide protection to purchasers. Unfortunately, while helpful in many respects, the inherent ambiguities in the 1995 revision have weakened its effectiveness by leading some Louisiana courts to the conclusion that ANY waiver of warranty, no matter how convoluted, irrelevant, or inappropriate, guts any and all implied warranty protection in Louisiana, especially as against manufacturers. We have problems with the meaning, applicability, and effect of the manufacturer's presumed bad faith (art. 2545); our courts lack a consistent understanding of when a waiver of the implied warranties of redhibition and fitness is effective; and, the relationship between the warranty against redhibitory defects and that of fitness for ordinary purposes was not clearly spelled out by the Louisiana legislature. This Article explains how the law in this area has developed since the 1995 revision, identifies where the problems lie, and proposes a solution. In contrast with other scholars who propose that the legislature revisit the relevant articles and either revise or repeal them, this Article argues that a more practical solution is simply for courts to interpret them in keeping with the underlying purpose of redhibition: protecting the consumer from unscrupulous sellers and manufacturers. Thus, those decisions that conclude that the mere signing of a boilerplate waiver proves the buyer understood what was being waived are inconsistent with the historical policy favoring the consumer as well as the intent of the 1995 revision.

* © 2024 Nadia E. Nedzel, J.D., LL.M., ACUE. Reilly Family Professor of Law Emerita, Southern U. Law Center; Visiting Professor of Law, Loyola University (New Orleans) School of Law.

I. INTRODUCTION

Louisiana's remedy for the sale of a defective thing is seemingly straight-forward: redhibition provides an implied warranty in every sale against a defect that existed (or apparently existed) when the thing was bought in a condition that "renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect [at the time of the sale]."[1] If the thing purchased has a defect, then the buyer must notify the seller in a timely fashion.[2] After that, if the seller did not know about the defect, then the buyer must allow the seller an opportunity to repair it.[3] If the seller is unable to repair the defect or unwilling to do so, then the sale is dissolved: the seller must return the purchase price with interest from the time of the sale plus any reasonable expenses occasioned by the sale and expenses incurred to preserve the thing, minus a set-off if the buyer was able to use the thing in the interim—and the buyer must return the thing (assuming it still exists).[4] Damages and attorneys' fees are available in addition to

1. LA. CIV. CODE ANN. art. 2520.
2. LA. CIV. CODE ANN. art. 2522.
3. *Id.*
4. LA. CIV. CODE ANN. art. 2531, 2532.

those remedies when the seller knew of the defect or if the defendant is the manufacturer, who is presumed to know of the defect.[5]

The Civil Code limits redhibition in a few sensible ways. As indicated, the defect must exist at the time of purchase,[6] and it must not have been apparent or such that it should have been discovered by a reasonably prudent buyer of such things.[7] If the defect is such that it did not render the thing totally useless and it could be presumed that the buyer would still have bought it but for a lesser price, then the seller may be required to return only a part of the price without fully dissolving the sale.[8] Redhibition is limited by time as well: Article 2534 provides a prescription scheme, and if the seller did not know of the defect, then prescription is four years from delivery or one year from discovery, whichever is first. If the seller knew of the defect, then prescription is one year from discovery. Finally, the implied warranty against redhibitory defects can be waived, but that waiver must be "clear and unambiguous" and must have been brought to the buyer's attention."[9]

La. Civ. Code Ann. art. 2548, in addition to specifying the requirements of an effective waiver, also indicates two instances when an otherwise effective waiver is ineffective: (1) if the seller "has declared that the thing has a quality that he knew it did not have," and (2) where the buyer can 'reach around' the seller's waiver to assert redhibition against previous sellers and the manufacturer by means of subrogation (though the buyer can sue the manufacturer directly as well). Finally, in the 1995 revision of the chapter, an implied warranty of fitness for ordinary use was added. Article 2524 stipulates (in part) that "[t]he thing sold must be reasonably fit for its ordinary use," and "[i]f the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations."

This Article explores how these concepts work together and the extent to which they do. In particular, problems have arisen concerning how the waiver provision and its exceptions should be interpreted where

5. LA. CIV. CODE ANN. art. 2545.

6. LA. CIV. CODE ANN. art. 2530.

7. LA. CIV. CODE ANN. art. 2521. *See e.g.* Rey v. Cuccia, 298 So. 2d 840, 843 (La. 1974), (*superseded by statute)*, manufacturing defects in new RV trailer existed before purchase, and were sufficient to prove that product was not reasonably fit for its intended use without having to prove the exact or underlying cause for malfunction); *but see* Louapre v. Booher, 2016-0236 (La. App. 4 Cir. 8/31/16), 216 So. 3d 1044, 1054 (no action for redhibition when buyers' professional inspection put them on notice of a number of problems and therefore they were not reasonably prudent when they went ahead with the purchase).

8. LA. CIV. CODE ANN. art. 2520.

9. LA. CIV. CODE ANN. art. 2548.

a manufacturer is the named defendant. The implied warranty of fitness has proven to be problematic. Consequently, in an effort to resolve some of the interpretive issues that Louisiana courts have faced, the Article explores legislative and jurisprudential history as well as underlying policy concerns.

Unfortunately, in an attempt to interpret the post-1995 revision articles in a coherent fashion, too many courts lose focus on the fact that the underlying public policy in this area involves balancing between providing consumers with a fair remedy against unscrupulous sellers and manufacturers while still encouraging free commerce in the technological age. Similarly, all prior scholarly commentary in this area concludes either that the warranty of fitness should be rescinded from the Code as inconsistent with civilian theory or that the legislature should clarify the relationship between it and redhibition.[10] But this posture is as unhelpful to courts and attorneys as it is impractical—even if the Louisiana State Law Institute (LSLI) and the legislature were to consider these issues, it would not help with cases that arise in the interim. Furthermore, as a practical matter in our bi-jural jurisdiction, consistent with the common-law side of our legal tradition, judicial decisions are *de facto* sources of law and one of the functions of case law is to fill gaps in legislation. This tradition is also part of the civilian jurisprudence (though its prominence varies widely among those jurisdictions that regard themselves as more purely civilian.)[11] After all, Article 4 of the Civil Code provides that "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."

---

10. George L. Bilbe, *Redhibition and Implied Warranties Under the 1993 Revision of the Louisiana Law of Sales*, 54 LA. L. REV. 125, 138-39 (1993); Christopher K. Odinet, *Commerce, Commonality, and Contract Law: Legal Reform in A Mixed Jurisdiction*, 75 LA. L. REV. 741, 760 (2015); Sara Daniel, Comment*, A Warranty Expired: Time to Rid Louisiana of Fit for Ordinary U*se, 79 LA. L. REV. 281, 300 n.135-37 (2018).

11. *See* Sabrina De Fabritiis, *Lost in Translation: Oral Advocacy in a Land Without Binding Precedent*, 35 SUFFOLK TRANSNAT'L REV. 301, 308 ("Present-day common law systems rely on stare decisis to maintain consistency when judges are filling in gaps in the law. Ambiguity as to case law or statutory interpretation in one court's decision may be cleared up when that same court, or another court within that jurisdiction, decides another case on different facts while addressing similar issues"); *id.* at 313 (In Civil law jurisdictions, judicial decisions are not a source of law). *See generally* Nadia E. Nedzel, *Chapter 18: The Rule of Law v. the Legal State: Where Are We Coming From, Where Are We Going To?*, 38 IUS GENTIUM 289 (2014) (comparison of common law/civil law methods and thought); NADIA E. NEDZEL, THE RULE OF LAW, ECONOMIC DEVELOPMENT, AND CORPORATE GOVERNANCE (Edward Elgar, Pub. 2020) (the history of both traditions).

The Article begins with a short history of the development of redhibition: its original sources, the 1995 revision, a few seminal cases, and some scholarly discussion. It then addresses trends in how courts have interpreted provisions for waiver, "ordinary use," bad faith or presumption of knowledge, and even fraud. It concludes that expurgating the implied warranty of ordinary use is unlikely and unnecessary. Louisiana is a mixed civilian jurisdiction and benefits from absorbing and recognizing concepts that drift over from common law states. Furthermore, while jurisprudence concerning waivers and the "ordinary use" warranty are at present inconsistent, if courts focus on the underlying purpose of redhibition (to protect consumers) and carefully consider the facts at issue to determine whether a waiver should be enforced or not, then both the implied warranty against redhibitory defects as well as Louisiana's implied warranty of fitness for ordinary use will be supported. If, however, courts focus solely on the language of the waiver and whether the buyer signed it rather than assessing as a factual issue whether his consent was likely made with understanding, then a La. Civ. Code Ann. art. 2548 boilerplate waiver subsumes the entire purpose of an implied warranty!

II. HISTORY AND POLICY CONCERNS

Most of the provisions in the Civil Code's chapter on redhibition have existed since the Civil Code of 1870, and many date back to Napoleon's original *Projet*.[12] A seller's obligation NOT to sell defective articles is part of the "overriding duty of good faith" that is fundamental to Louisiana law. The provision that an obligation must be performed in good faith is "inextricably rooted in civilian tradition," and the implied warranty against redhibitory defects is merely a specific application of this duty.[13] The primary purpose behind the warranty is thus to protect unknowing purchasers from dishonest sellers; to restore the parties to their original positions; and (when possible) to uphold the "stability and sanctity" of transactions.[14]

12. Elizabeth A. Spurgeon, Comment, *All for One or Every Man for Himself? What Is Left of Solidarity in Redhibition*, 70 LA. L. REV. 1227, 1233 (2010).

13. *Spurgeon* at 1235.

14. *Odinet* at 757; Young v. Ford Motor Co., Inc., 595 So. 2d 1123 (La. 1992), quoted in Aucoin v. Southern Quality Homes, LLC, 984 So.2d 685, 691 (La. 2008); Axis Oilfield Rentals, LLC v. Mining, Rock, Excavation and Construction, LLC, 166 F.Supp. 3d 684 (E.D. LA. 2016) ("The Policy Behind Louisiana's Redhibition Law is one of consumer protection." (citations omitted)).

It was in line with this policy of discouraging dishonest sellers and manufacturers that the Louisiana Supreme Court decided the seminal case of *Media Production Consultants, Inc., v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So.2d 377 (La. 1972) (*MBNA*). While the Civil Code's revision comments are not legislation and therefore not law, courts often do rely upon them as if they were;[15] therefore, they are highly persuasive authority and once adopted by courts, become customary law under LA. CIV. CODE ANN. art. 3. *MBNA* is listed in the comments for La. Civ. Code Ann. art. 2545 as justification for adopting the principle that a manufacturer be deemed to be in bad faith and deemed to have knowledge of pre-existing defects in the thing sold. What is often overlooked about *MBNA* is that it involves a waiver of warranty.

A. Media Production Consultants, Inc., v. Mercedes-Benz of North America, Inc.

In MBNA, the plaintiff, a public relations firm, purchased a new 1968 Mercedes-Benz from Cookie's Auto Sales, Inc. The car had been manufactured in Germany by Daimler-Benz, which then transferred it to Daimler-Benz of North America, the America importer. When the car entered the United States, the importer transferred it to Mercedes-Benz of North America, the distributor, which inspected it, prepared it for sale, and sold it to Cookie's. In the car's manual, furnished by MBNA, was the following language:

> Seller warrants (except as hereinafter provided) each part of each new Mercedes-Benz motor vehicle sold by dealer and operated in North America; i.e., the U.S.A. and Canada (including each part of any accessory or equipment thereon manufactured by Daimler-Benz A.G. or supplied by Mercedes-Benz of North America, Inc.) to be free from defects in material and workmanship under normal use and service until such motor vehicle has been operated for a distance of 24,000 miles or for a period of 24 months from the date of delivery to the original purchaser or from the date of initial operation, whichever event shall first occur.
>
> Seller's obligation under this warranty is limited to the replacement or repair at Seller's option, without charge for installation at Seller's place of business, of such parts as shall be returned to and acknowledged by Seller to be defective. . . .

15. Dian Tooley-Knoblett & David Gruning, *§ 11:31 Solidary Liability of Prior Sellers to Buyer and Liability Among Themselves*, 24 LA. CIVIL. L. TREATISE (2023).

> This warranty is expressly in lieu of all other warranties and representations, expressed or implied, and of all other obligations or liabilities on the part of the Seller, Mercedes Benz of North America, Inc., and Daimler-Benz of North America, Inc. and Daimler-Benz A.G. Seller neither assumes nor authorizes any other person to assume for it any other liability in connection with such motor vehicle.[16]

When plaintiff Media Production purchased the car, the service policy repeated the last part of the MBNA waiver.[17] Unfortunately, immediately after purchase, the plaintiff found the car to be so defective that he could not use it: the interior trim was peeling, interior lights did not work, it had transmission problems, it stalled in traffic, the air conditioning was defective (in south Louisiana!), the brakes squealed excessively, rear window channels were deteriorated, the paint was deficient, and the car vibrated.[18] After repair efforts proved futile, Media Production surrendered the car to an authorized dealer and filed suit. Both lower courts found the car's defects to be redhibitory and held against Cookie's for the purchase price, but unfortunately Cookie's was no longer in business, and the issue became whether MBNA was liable for redhibition despite the limitation of warranty language and the lack of polity with the ultimate purchaser, Media Production.

The Louisiana Supreme Court began its opinion by stating that "[t]he jurisprudence is well settled that warranty limitation provisions in automobile manuals and similar documents delivered with the vehicle have no effect upon the statutory warranty of fitness." (Citations omitted.) "Hence, despite the warranty limitation in the Owner's Service Policy, Media has not renounced the warranty of fitness."[19]

The Court then famously went on to hold that MBNA occupies the position of manufacturer, and was therefore liable to plaintiff Media Production for the defective vehicle regardless of any lack of privity.[20] In concurrence, Justice Dixon added that not only was Media Production subrogated to Cookie's rights in warranty and that Cookie had not waived its rights against MBNA, but also that the waiver was not specific because it did not mention that the warranty against redhibitory vices meant that it covered those defects that might render a car absolutely useless or its use so imperfect that the buyer would never have purchased it.[21] With regard

16. *MBNA*, 262 So. 2d at 379 (La. S. Ct. 1972).
17. *Id.*
18. *Id.* at 380.
19. *Id.*
20. *Media Production Consultants, Inc.*, 262 So. 2d at 380-81.
21. *Id.* at 382.

to public policy, the majority added the following: "The [Louisiana] Legislature has declared that the distribution and sale of motor vehicles in Louisiana vitally affect the public interest. (citation omitted). By placing automobiles on the market, the supplier represents to the public that the vehicles are suitable for use."[22] *MBNA* established that the manufacturer of an automobile was presumed to know of its defects (a presumption subsequently incorporated into Article 2545).

The Louisiana Supreme Court's next pre-revision case, *Rey v. Cuccia*, involved the seller and manufacturer of a brand-new camper trailer purchased by plaintiffs Rey and established that the manufacturer may not rely on its own one-year post sale prescription period: prescription is one year post discovery by the ultimate buyer, whether the buyer purchased the thing from the manufacturer or from a dealer or other seller.[23.]

III. MANUFACTURERS OF RVS, MOBILE HOMES, AND CARS AND THEIR LIABILITY

Many of the cases in this area (including the three most important Louisiana Supreme Court cases) involve sales of vehicles, RVs, and homes (movable or not), while only a few involve commercial products such as oil field pipes and siding for buildings. One can understand the prevalence of vehicle cases (whether the cause of the purchase is transportation or recreation) because such purchases are important ones in most consumers' lives and thus are areas where consumers are most vulnerable.

In light of MBNA and other cases, the manufacturer's presumption of knowledge of a defect was officially added to the Civil Code in 1993 in Article 2545, formalizing a rule that courts had adopted many years earlier.[24] Logically, the one who created the thing is in the best position to know of any defects in it.[25]

The Louisiana Supreme Court's next pre-revision case, *Rey v. Cuccia*,[26] involved the seller and manufacturer of a brand-new camper trailer purchased by plaintiffs Rey. It established that the manufacturer may not rely on its own one-year post sale prescription period: prescription is one year post discovery by the ultimate buyer, whether the

22. *Id.* at 381.

23. *Rey*, 298 So. 2d 840 (superseded by statute *1993 La. Sess. Law Serv. Act 84*).

24. Christopher K. Odinet, *Commerce, Commonality, and Contract Law supra* note 10, at 760.

25. *Odinet* at 74.

26. 298 So. 2d 840 (La. 1974) (superseded by statute *1993 La. Sess. Law Serv. Act 84)*.

buyer purchased the thing from the manufacturer or from a dealer or other seller. As with the presumption of knowledge of the defect, *Rey* probably led to the codification of the one-year-post-discovery prescription provision for bad-faith sellers and manufacturers in Article 2534, but it is most known for the statement that the buyer need only prove by reasonable inference that the defect existed at the time of the sale and rendered the product "useless." The defendant has the burden of proving it was not so.

Mr. and Mrs. Rey's trailer had been built by defendant manufacturer Yellowstone Inc. and sold to them by dealer Cuccia. After nine days and only 135 miles in their possession, it fell apart on Interstate-10 while returning to New Orleans from Dauphin Island, Alabama: "the trailer body had come loose from the frame, the frame was buckled, and the right rear of the trailer body was down toward the ground."[27] Holding for the Reys, the Court posited that the buyer must prove that the defect existed before the sale was made to him, but it is sufficient if he proves that the product purchased is not reasonably fit for its intended use, and so the buyer is not required to prove the exact or underlying cause of the malfunction. The buyer may prove the existence of redhibitory defects at the time of the sale not only by direct evidence, but also by circumstantial evidence giving rise to the reasonable inference that the defect existed at the time of the sale, and a preponderance of proof is sufficient in such cases. [28] It is this language for which *Rey* is known and continually cited, and it clarifies that the "three days" mentioned in Article 2530 is exemplary, not exclusionary. Here, as the defect appeared shortly after the trailer was put into use, the trial court was justified in inferring that in the absence of any other explanation, the defect existed at the time of the sale.

While the defect was clear, and the Reys' claim against the seller was clear, the Court acknowledged that the claim against the manufacturer was not as clear. The Court followed the same line of reasoning as in MBNA that there need not be any privity between the manufacturer and the ultimate buyer, and it held that the fact that the sale to dealer Cuccia had occurred more than a year before the trailer was sold to the Reys did not raise into question the prescriptive period: the manufacturer is presumed to know of the defect in the thing made by him. The one-year limitation on redhibitory actions does not apply where the seller (manufacturer) had knowledge of the defect [and] failed to declare it at the time of the sale. In such instance, the consumer may institute the

27. *Rey*, 298 So. 2d at 842.
28. *Id.* at 843.

action to recover for the redhibitory defect within the year following his discovery of it.[29] Ultimately, Yellowstone was held solidarily liable with Cuccia for the defects in the Reys' trailer.[30]

Prince v. Paretti Pontiac Co., 281 So.2d 112, 116 (La. 1972) is the third important pre-revision automotive case discussing the manufacturer's presumption of bad faith. It involved a new car with a defective transmission from the outset, rendering it useless. The Louisiana Supreme Court held that because the manufacturer is presumed to be in bad faith, the plaintiff Prince did not need to provide Paretti with an opportunity to repair the car before proceeding with his redhibition claim. The Paretti court also set a now widely-used standard for waivers, somewhat more detailed than that in Article 2548, and which is discussed in the following section. All three cases, *MBNA*, *Rey*, and *Prince* are still regularly cited, and thus still provide good law.

IV. THE 1995 REVISION AND IMPORTANT POST-REVISION JURISPRUDENCE

In 1985, the LSLI began what was intended to be a thorough revision of the law of sales in an effort to modernize it line with national and international trends.[31] Nevertheless, most of the revision merely rephrases well-established prior code and jurisprudential law, as noted in 1993 by Professor George Bilbe.[32] The new provisions were the additions of an implied warranty of usefulness for ordinary purposes, an implied warranty of usefulness for particular purposes, and an implied warranty of kind or quality. As was seen in the above discussion of *Rey*, Louisiana courts have long used the phrase "implied warranty of usefulness for ordinary purposes" in discussing redhibition.

A. Presumption of Knowledge and the Manufacturer's Direct Liability for Redhibitory Defects

Post-revision and consistent with *Rey* and *Prince,* the Louisiana Supreme Court held the manufacturer of a prefabricated home liable for defects in *Aucoin v Southern Quality Homes*.[33] In this case, the two sides

29. *Id.* at 846

30. *Id.* at 847.

31. Sara Daniel, Comment, *A Warranty Expired: Time to Rid Louisiana of Fit for Ordinary Use*, 79 LA. L. REV. 281, 300 n.135-37 (2018) (Citing Saul Litvinoff, Reporter, *La. State L. Inst., Revision of the Law of Sales* (Nov. 17018)).

32. George L. Bilbe, 54 LA. L. REV., at 138-39.

33. *Aucoin*, 984 So. 2d at 692-693.

of the home were not properly "married," and as installed, the home leaked badly and had other problems. Despite the manufacturer's assertion that its warranty expressly excluded improper marriage of the two halves, after a detailed discussion of both *MBNA* and *Rey*, the Court held that:

> whether the manufacturer is solidarily liable with the seller for redhibitory defects is immaterial in this case, as the manufacturer is directly liable for redhibitory defects resulting from the original manufacture of the product. . . . the trial court found, and the court of appeal affirmed that the redhibitory defects were manufacturing defects, for which the manufacturer would be independently liable.

The Supreme Court limited the damages awarded by the lower courts to what is specified in Article 2545: the manufacturer's liability was limited to the purchase price of the mobile home with interest from the time paid, reimbursement of reasonable expenses, expenses incurred for the preservation of the home in the interim, and reasonable attorneys' fees (as per Article 2545). It was not liable for the price of the land on which the buyer had the mobile home installed, as the plaintiff retained ownership of that property.[34] Again, the underlying implication is that in Louisiana post-revision as well as pre-revision, manufacturers are liable for the usefulness of the products they place into the stream of commerce.

B. Article 2548, Prince, and Ineffective Manufacturer's Warranty Limitations

Article 2548 gave "legislative formulation" to "well-established" jurisprudential rules, in other words, the waiver language from *Prince*. Apparently, there was some warranty limitation language in the paperwork provided to the plaintiff, however the Supreme Court said this about it:

> Warranty limitation provisions in "Buyer's Order" documents and automobile service manuals have no effect on the implied warranty against hidden defects. Media Pro. Consult., Inc. v. Mercedes-Benz of N.A., Inc., supra. Although the buyer may waive the implied warranty against hidden defects (C.C. 1764(2) and 2548), the waiver must be clear and unambiguous. C.C. 2474; *Andry v. Foy*, 6 Mart. (o.s.) 689 (1819). In this case, no waiver of the implied warranty against hidden defects is contained in the 'Sale and Chattel Mortgage' document. There is also no evidence

34. *See also* Wilks v. Ramsey Auto Brokers, Inc., 132 So. 3d 1009, 1015 (La. Ct. App. 2d Cir. 2014).

> that any alleged waiver clause was either brought to the purchaser's attention or explained to him. Hence, we conclude that the plaintiff did not waive the implied warranty against hidden defects which ran in his favor.[35]

Since the 1995 revision, rather than referring to Article 2548's language, most courts cite *Prince*, stipulating that an effective manufacturer's waiver must be "clear and unambiguous," included in the sale documents, and either explained to the buyer or brought to his attention.[36] This is consistent with *Prince*, but a bit more specific than as stipulated in the revised Civil Code.[37]

Post revision, three problems arose: the interaction between the Manufacturer's "Deemed to Know" language in Article 2545 and the Article 2548 waiver; what constitutes an effective waiver; and the interaction between redhibition and the implied warranty of usefulness for ordinary purposes. Each is discussed in turn in the following Parts.

V. THE INTERACTION BETWEEN MANUFACTURER'S ARTICLE 2545 "DEEMED TO KNOW" AND THE ART 2548 WAIVER

One of the most important questions that has surfaced since the revision includes a lack of clarity about the MBNA stipulation that an automotive manufacturer's waiver of warranty is ineffective. *MBNA* was not overturned nor are there any overt indications that it was in any way superseded by the revision. The intent was apparently only to allow for an effective waiver, not to create a presumption that any and all detailed waivers that mention redhibition and are signed by the plaintiff are effective—in fact, Article 2548 stipulates that a waiver must be (at the very least) clear and unambiguous and brought to the buyer's attention. (*Prince* adds the detail that it must be included in the sales document.) Nevertheless, nothing in Article 2548 indicates any intent to overturn the MBNA presumption that a manufacturer's waiver is ineffective.

In fact, one can infer that there was no such intent to overturn the presumption against manufacturer's waivers, merely an intent to clarify that some sellers' waivers MAY be effective where "clear and unequivocal and brought to the buyer's attention." Article 2548 provides that a "buyer is not bound by an otherwise effective [waiver] when the

35. *Prince*, 281 So. 2d at 117.

36. *See e.g.* Modicue v. Prince of Peace Auto Sale, LLC, 328 So. 3d 1239, 1249 (La. Ct. App. 2d Cir. 2021).

37. An odd thing about post-*Prince* decisions is that courts apply its standard to manufacturers because the court offhandedly said it applied to "sellers/manufacturers," but in fact, the defendant was a seller, not a manufacturer.

seller has declared that the thing has a quality that he knew it did not have," and when combined with the Article 2545 presumption that a manufacturer is deemed to know that the thing is defective, implies that any such waiver would still be presumed ineffective. Nevertheless, post revision, plaintiffs fail to assert either that such manufacturers' waivers should be presumed ineffective or that manufacturer declared the thing had a quality it knew the thing did not have.

Consistent with Article 2545 and *Rey*'s allocation of the burden of proof on the dealer to prove either a lack of defect or an effective waiver, plaintiffs should not have a heavy burden of proof in this regard to overturn a waiver through proving an inaccurate declaration by the seller that the thing had a quality seller/manufacturer knew it did not have.

A. Advertising "Declarations"

With regard to advertising language, in a case concerning an allegedly ineffective Yamaha boat motor, the Eastern District held that the otherwise effective waiver was ineffective because in its advertising material, Yamaha bragged that the line of motors in question contained "high-power engines that exhibit exceptional product life" and that they had "unmatched reliability and durability,"[38] and that in doing so, the manufacturer had 'declared' the thing had a quality that it knew it did not have. Furthermore, there is nothing in Article 2548 that indicates that this is the exclusive time that a waiver can be found to be ineffective. Putting the burden on the seller or manufacturer to prove that the waiver was effective—especially in connection with the presumption of knowledge on the part of manufacturers and the MBNA language—would be a more accurate and logically coherent view of the entire chapter. Consistent with the underlying public policy that the purpose of redhibition is to provide remedy for consumers that are victimized by unscrupulous manufacturers, plaintiffs' bar should assert more claims in line with that advanced in *Pitre*. This would also encourage more courts to grant relief from some of the ridiculously long and garbled waivers that have come to dominate this area.

38. Pitre v. Yamaha Motor Co., Ltd., 51 F. Supp. 3d 644, 669 (E.D. La. 2014).

B. Placing Burden of Proof on the Manufacturer or Seller to Show both That the Waiver Was Effective and That It Had No Knowledge of the Defect

Putting the burden of proof that a seller's or manufacturer's waiver is effective on the one who propounded it is an even stronger approach consistent with MBNA and the public policy of protecting consumers than is perusing the advertising for a declaration. *Boos v. Benson Jeep-Eagle* involved the sale of a used car that proved shortly thereafter to have a bad transmission and severe electronic problems. What was otherwise an effective waiver was defeated when the court found that the seller had knowledge of the redhibitory effect. The Louisiana Fourth Circuit stated that such waivers must be strictly construed against the seller.[39] In examining the "disclaimer of warranty" as well as a second document containing a similar waiver entitled "Security Agreement," the court acknowledged that the text was readable; the waivers were clear and unambiguous; and a person of average intelligence reading and signing them would understand that he was waiving any right to any warranty on the used vehicle he was purchasing. However, consistent with Article 2548, the court went on to state that even where a waiver is sufficiently detailed and brought to the buyer's attention, it is not effective if the vendor knew or should have known of the defect and failed to declare it.[40]

The court held that the nature of the defects were such that would become apparent pursuant to the type of inspection someone in the defendant's business would be presumed to make at the time it calculated the price it was willing to pay for the vehicle, or if not at that time, then certainly no later than when the seller determined the price at which it was willing to sell the vehicle. Thus,

> where it is reasonable to expect that an inspection was made by the used car dealer, the burden is on the vendor of used cars to show that a reasonable inspection was made and no defects were discovered . . . . placing the burden of proof on the vendor in these circumstances will discourage fraud and consumer abuse in an area of commerce that is particularly vulnerable to such possibilities, not to mention the fact that proof of the existence and results of any such inspections is completely within the control of the vendor.[41]

39. Boos v. Benson Jeep-Eagle Co., 98-1424 (La. App. 4 Cir. 6/24/98), 717 So. 2d 661, 664, *writ denied,* 98-2008 (La. 10/30/98), 728 So. 2d 387, citing Guillory v. Morein Motor Co., Inc., 322 So. 2d 375, 378 (La. Ct. App. 3d Cir. 1975).

40. *Boos*, 98-1424 La. App. 4 Cir. 6/24/98.

41. *Id.* at 665-66.

The court found that the vendor's sales person's affidavit, which stated that he had no knowledge of the vehicle's substantial flood damage, was insufficient and did nothing to rebut the presumption that the defendant had constructive knowledge of the defect even if it did not have actual knowledge.

Sadly, because of Louisiana's courts' failure to enforce the *MBNA* presumption against waivers and warranty limitations since the revision, unscrupulous manufacturers and sellers have apparently been able to take advantage of consumers. In fact, the trend has become so obvious that it has been argued that a professional seller standard should be adopted just for the used car industry![42] Nevertheless, there are several ways to attack a manufacturer's or seller's limitation or waiver of warranty clause even without resorting to the declaration provision in art. 2548.

VI. THE WAIVER ITSELF

As mentioned previously, Article 2548 provides that the parties may agree to limit or exclude the warranty against redhibitory defects. It provides:

> The parties may agree to an exclusion or limitation of the warranty against redhibitory defects. The terms of the exclusion or limitation must be clear and unambiguous and must be brought to the attention of the buyer.
>
> A buyer is not bound by an otherwise effective exclusion or limitation of the warranty when the seller has declared that the thing has a quality that he knew it did not have.
>
> The buyer is subrogated to the rights in warranty of the seller against other persons, even when the warranty is excluded.

Much litigation has been brought concerning whether a waiver is effective as per the strictures presented in Article 2548's first paragraph, and the themes of that litigation are discussed *infra*. As discussed *supra*, there remains a lack of clarity concerning how the second paragraph applies to

42. Jeanne Frances Harvey, Note, *Redhibition: An Argument for the Adoption of a Professional Seller Standard for Automobile Dealers*, 43 LA. L. REV. 1101 (1983). *See e.g.* Chaudoir v. Porsche Cars of N. Am., 95-729 (La. App. 3 Cir. 12/6/95), 667 So. 2d 569, *writ denied sub nom. Chadoir*, 96-0800 (La. 5/31/96), 673 So. 2d 1033; Savannah v. Anthony's Auto Sales, Inc., 618 So. 2d 676 (La. Ct. App.), *writ denied,* 626 So. 2d 1174 (La. 1993); Reilly v. Gene Ducote Volkswagen, Inc., 549 So. 2d 428 (La. Ct. Ap. 5 Cir. 1989); Thibodeaux v. Meaux's Auto Sales, Inc., 364 So. 2d 130 (La. App. 3d Cir. 1978).

a manufacturer whose knowledge of defects is presumed (and the third paragraph dealing with subrogation is a bit trickier than first appears).[43]

As mentioned previously, in *Prince*, 281 So. 2d at 117, the Louisiana Supreme Court established that to be effective, a seller/manufacturer's waiver must be: (1) written in clear and unambiguous terms; (2) contained in the sales documents; and (3) either brought to the attention of the buyer or explained to him. Courts accordingly should defer to consumer-purchasers, conforming to the Louisiana Supreme Court's finding that "safeguards protecting consumers must be more stringent than those protecting businessmen in the marketplace."[44] As discussed above, the burden of proving the waiver should consistently be placed on the seller/manufacturer, but additionally the three waiver requirements should be interpreted strictly.[45] Such waivers are ineffective where they do not meet all three requirements of the *Prince* /art. 2548 test.[46] As per Article 2548's clear language, the *Prince* test applies to provisions that limit liability or recoverable damages as well as waivers.[47]

A. "Clear and Unambiguous"

Louisiana courts have long held that any waiver of the statutory warranties must be express, explicit, and strictly construed.[48] The factual issue becomes how explicit: the finding that a waiver is ambiguous is a finding of fact and depends both on the language of the waiver itself and the level of sophistication of the buyer. If the buyer is unsophisticated, the language used must not be such that only an attorney would understand it, but where the plaintiff is a sophisticated buyer, simple language may

43. In general, having taught both Obligations and Sale and Lease for almost two decades and written casebooks for both topics, it has become apparent that the easiest way to get a deer in the headlights reaction from students—or even many attorneys—is to mention the terms subrogation, solidarity, redhibition, or eviction. Three of the four topics are involved in an understanding of redhibition, to say nothing of the fact that the standards for waivers in redhibition and eviction are entirely different. Even though those differences are entirely justified by the difference in topic, students very often confuse the two.

44. Sw. Louisiana Hosp. Ass'n v. BASF Const. Chemicals, LLC, 947 F. Supp. 2d 661, 670 (W.D. La. 2013), *amended* (Sept. 6, 2013), citing Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So.2d 92, 96 (La.1979).

45. *Boos*, 717 So. 2d at 664.

46. Pias v. Wiggins, 96-499 (La. App. 3 Cir. 10/9/96), 688 So. 2d 1103, 1106, *writ denied,* 96-2691 (La. 1/10/97), 685 So. 2d 143.

47. *Southwest Louisiana Hosp. Ass'n*, 947 F. Supp. 2d at 671 citing Harvey v. Mosaic Fertilizer, LLC, No. 06-9512, 2009 WL 3112144 (E.D. La. Sept. 25, 2009); Fontenot v. F. Hollier & Sons, 478 So. 2d 1379 (La. Ct. App. 1985), *writ granted sub nom.* Lafleur v. John Deere Co., 481 So. 2d 1326 (La. 1986), and *aff'd as amended sub nom. Lafleur*, 491 So. 2d 624 (La. 1986).

48. *Guillory*, 322 So. 2d at 378.

not be necessary—but a waiver may still be found to be unclear and hence ineffective for other reasons. Waivers have been invalidated because the language was too complicated and unclear for a layman; too simplistic to convey the rights being given up; or because other documents included in the sale conflicted with the language of the waiver. Thus, whether a waiver is clear and unambiguous depends not just on the language of the waiver itself, but also on the audience for whom it is intended. The following provides examples of waivers that were found to be too complicated, too simplistic, or inconsistent with other provided documents and thus ambiguous. An example of one that was found effective is also included, but note that in that example, the court found that the buyer, a lawyer, should have understood the language despite the fact that it was very poorly drafted. The decision might have been otherwise had the buyer not been so highly educated.

1. Complicated Language

A waiver may be ineffective if its language is so sophisticated that the average buyer would not understand it. For example, one waiver said as follows:

> Purchaser . . . does hereby waive the warranty of fitness or guarantee against the redhibitory vices applied in Louisiana by operation of law, more specifically, that warranty imposed by [then] Civil Code Article 2476, or other applicable law. . . . Additionally, I forfeit any right I may have in redhibition pursuant to Article 2520 and following articles.[49]

The Louisiana Third Circuit stipulated that the waiver was ineffective because it was not "clear and unambiguous." It was couched in legal terms, not in terms that can be read and understood by a layman, and "clear and unambiguous" means the language used must be comprehensible by the average buyer. In this case, the plaintiff had only a sixth-grade education, and she stated that she neither knew what "redhibition" meant nor did she have any knowledge of the Civil Code articles cited.

2. Truncated or Simplistic Language

On the other extreme, a waiver may be found to be unclear where it is simplistic or lacks specificity. In a case involving the sale of a home, the alleged waiver provided that the seller "does not know or warrant of

49. Thibodeaux v. Meaux's Auto Sales, Inc., cited and quoted in Ronald L. Hersbergen, *Contracts of Adhesion Under the Louisiana Civil Code*, 43 LA. L. REV. 1 (1982).

flood condition," and the court held that those disclosures were insufficient to place the purchaser on notice that she was waiving her rights to claim the house was flood-prone.[50]

In addition to language that is either too sophisticated or too simplistic, a waiver may be ineffective because it conflicts with other sales documents. In another Third Circuit case, the court found not only that the waiver was not contained in the sales document as required nor written as required by the jurisprudence, but also indicated that the salesman's testimony—where he explained that the car was being sold without a warranty by using a "healthy man/heart attack" analogy—made it doubtful that the alleged oral waiver was sufficiently clear or specific.[51] Similarly, a mere indication that the car is being sold without warranty by means of a hand-written "0" after the word warranty in an inconspicuous position is insufficient, specifically if the buyer is semi-literate.[52]

An effective waiver, according to Louisiana's Third Circuit, should state that the purchaser waives express and implied warranties, including the warranty of fitness for a particular purpose and the warranty against redhibitory vices.[53] A waiver that specifically fails to state that the purchaser waives both express and implied warranties, including the warranty of fitness for a particular purpose and the warranty against redhibitory vices, is likely to be found ineffective.[54]

3. Ambiguity Created by Context, Inconsistent Language, or Conflicting Documents

A waiver may be found to be unclear and ambiguous because of a seller's personal assurance that the thing was in good condition.[55] Such personal assurance could also be grounds for a declaration that the seller/manufacturer declared the thing had a quality he knew it did not have, especially in an as-is sale.[56] Even where the buyers are much more sophisticated and several purported waivers or limitations are included in

50. Moses v. Walker, 98-58 (La. App. 3 Cir. 6/17/98), 715 So. 2d 596, 599.

51. *Pias*, 688 So. 2d at 1106 (i.e. a healthy man could have a heart attack tomorrow, (similarly), this car's engine could fail tomorrow).

52. *Guillory*, 322 So. 2d at 78. *See also* Valobra v. Nelson, 2014-164 (La. 4/11/14), 136 So. 3d 793, 795 (in the sale of a home, a disclosure form that merely state that the seller does not know of any defects is not sufficient to constitute a waiver of implied warranties).

53. Modicue v. Prince of Peace at 1249.

54. *Wilks*, 132 So. 3d at 1014. *See also* Performance Contractors, Inc. v. Great Plains Stainless, Inc., No. CIV.A. 11-485-JJB, 2012 WL 5398534, at *3 (M.D. La. Nov. 2, 2012) (M.D. La. Nov. 2, 2012).

55. *Modicue* at 1249.

56. *Wilks* at 1015.

several of the sale documents, if they are inconsistent with each other or difficult to find, the court is likely to find them to be unclear and unenforceable. Such was true in *Southwest Louisiana Hosp. v. BSF Construction Chemicals*, where the defendant's exterior coating proved ineffective because it contained iron pyrite particles that began to rust even before the plaintiff hospital's building project was completed.[57] A lack of clarity was found as well because the warranty waivers contained in two emailed letters were nowhere expressly incorporated into the sales document.[58] While this could have been analyzed under the second *Prince* requirement as well as the first, what the court pointed out was that the inconsistent language called into question both the clarity of what was and was not waived and whether the waiver was even part of the sale.

In another example, a waiver that might otherwise have been found to be effective was compromised by additional language in the buyer's order. The waiver listed all the specifics required but was prefaced with a statement: "Unless we give you a written warranty or enter into a service contract with you within 90 days from the date of this contract, we make no warranties . . ."[59] If the buyer actually entered into a service contract as indicated, a careful reading would indicate that all implied warranties were effective, not ineffective.

In addition to overly complicated and spread-out documents with inconsistent waiver language, a sample document used by a seller/manufacturer of mobile homes and brought to the author's attention stipulates that it is a "Customer Delivery and Warranty Registration Form," thus insinuating that it is an express warranty. It lists many items that have allegedly been inspected as indicated by a complicated and exhaustive series of little boxes that are to be checked off by both buyer and seller, but never actually provides any warranty. It does, however, contain a small box in the lower right-hand corner containing an explicit waiver of implied warranties—a statement that this has been brought to the buyer's attention and that by signing it, the buyer is attesting that what is stated is true—and right below that box is a space for the purchaser's signature and a date.

---

57. Sw. Louisiana Hosp. Ass'n v. BASF Const. Chemicals, L.L.C., No. 2:10-CV-902, 2014 WL 4955697 (W.D. La. Oct. 2, 2014).

58. C-Innovation, LLC v. Norddeutsche Seekabelewerke GMBH, No. CIV.A. 10-4441, 2013 WL 990066, at *6 (E.D. La. Mar. 13, 2013) (E.D. La., March 13, 2013).

59. Hutchins v. Jayco Inc. of Indiana, 2023 WL5610388 *4 (W.D. Louisiana Aug. 29, 2023). *See also Hutchins*, WL 5610338 at *5 ((Not reported in F. Supp.) (W.D. Louisiana Aug. 29, 2023) (conflicting documents and ambiguous language made the issue of whether the waiver was effective an issue of fact for trial).

A normal unsophisticated buyer would not be troubled with the waiver of implied warranties because he or she is likely to assume that an express warranty is better than an implied warranty, and may be impressed by the detailed list of items that were "inspected." The buyer is therefore likely to sign the waiver which specifically "acknowledges" that the waiver has been brought to his or her attention. However, a buyer who is more sophisticated might realize that there is, in fact, no express warranty to replace that which was waived, and thus the entire document is not merely ambiguous, it is intentionally misleading and therefore fraudulent. It could also be viewed as unconscionable because the parties are on severely unequal footing and because the terms are such that no honest seller would require and no sensible buyer would accept.

An example of what a court held to be a "clear and effective waiver" can be found in *Shelton v. Standard/700 Assoc.*, 78 So.2d 1265, 69 (La. 4th Cir. Ct. App 2001); *affirmed* 798 So.2d 60 (La. 2005), where the buyer of a condominium in New Orleans sued in redhibition because the swimming pool above her (on the roof of the building) leaked into her apartment. The act of sale contained the following language:

> Notwithstanding anything herein to the contrary, the unit described herein is sold and purchased "as is where is," without any warranty or representation whatsoever with respect to the condition or remaining useful life of such condominium unit . . . And without warranty whatsoever with respect to the fitness of any condominium unit of the common elements for any particular or general use or purpose and no representation or warranties with respect to any of the foregoing are made, all of them being expressly disclaimed. . . .
>
> Purchaser hereby waives any right to sue in redhibition or for return or reduction of the purchase price or any part thereof as a result of the condition of the unit or units described herein or the condominium.

The trial and reviewing courts both held that (despite the ungrammatical and nearly incoherent run-on sentences) the plaintiff, an attorney, had effectively waived her right to sue for redhibitory defects. They eventually held that she could not demonstrate fraud in the inducement either (a holding affirmed by the Supreme Court) because no one was aware that the pool had ever leaked. Furthermore, as an alternative to a clear waiver, if a contract of sale contains a forum selection clause that clearly states

that the law of some state other than Louisiana applies, that clause is likely to be viewed as an effective waiver of Louisiana's implied warranties.[60]

Unfortunately, a number of post-revision cases have held that a block waiver that includes such detailed language as in *Shelton* is effective whether or not a non-lawyer would have any understanding of the terminology in the absence of a careful and thorough explanation! An underlying principle of black-letter consent law is that to be effective, consent must be made with knowledge and understanding.[61] The purpose of the Article 2548 waiver is apparently to empower a buyer to take on the risk of a redhibitory defect, presumably in exchange for a price that reflects that risk.[62] Where that does not seem to have been the case—for example, in any sale of a new item—it would be unusual and even an indicia of bad faith for a seller to demand a waiver of all express and implied warranties. But even with an as-is sale (discussed below), where a waiver makes sense as an offset for a low price, any waiver should still be interpreted strictly against the seller because one would expect even a used thing to perform for a period reasonable under the circumstances.

B. Brought to the Buyer's Attention or Explained to Him

The *Prince* stipulation that the waiver be contained in the sales document is usually not litigated. Most sellers (including used-car dealers) as a matter of habit include a written waiver of some kind among the large number of documents the buyer is asked to sign at the act of sale. However, analyzing whether the waiver was either brought to the buyer's attention or explained to him is yet another way to attack a waiver of implied warranties. In *Sorina-Washington v. Mobile Mini, Inc.,* 2005 WL 221557 at (E.D. La. January 27, 2005) (not reported in Fed. Supp.), the active-military duty lessee of a mobile storage unit that leaked was able to defeat what might otherwise have been effective waiver, and thus defendant's summary judgement motion, by the fact that a copy was never provided to her. Similarly, in a case involving sophisticated buyers, the defendant was never able to prove that plaintiffs had actually received a specific warranty waiver concerning the purchase of the helicopter in

60. Bayouland Bowhunters & Outfitters Inc. v. Bowtech Inc., No. 6:19-CV-00295, 2020 WL 764244 (W.D. La. Feb. 14, 2020) (not reported in Fed. Supp.); Axis Oilfield Rentals, LLC v. Mining, Rock, Excavation & Constr., LLC, 166 F. Supp. 3d 684 (E.D. La. 2016).

61. *See e.g. Informed Consent*, BLACK'S LAW DICTIONARY (8th ed. 2004) "A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives."

62. Dean Toole-Knoblettt & David Gruning, *§ 11:34 Waiver Against Redhibitory Defects and Other Warranties*, 24 LA. CIV. L. TREATISE, SALES (Nov. 2023 update).

question, let alone that plaintiffs had any knowledge of or had agreed to a waiver.[63]

Similarly, in *Southwest Louisiana Hospital,* discussed above, the Western District of Louisiana began its analysis in a suit concerning a new building's defective finish coat in a "brought to the attention case" by noting that courts have deferentially applied the *Prince* standard to consumer-purchasers, conforming to the Louisiana Supreme Court's finding that "safeguards protecting consumers must be more stringent than those protecting businessmen in the marketplace."[64] Waivers of implied warranties can be found ineffective where they do not meet all three *Prince* requirements, and the seller or manufacturer has the burden of proving that the buyer waived the warranties.[65] A waiver may be effective where it was signed by the buyer and signed by the buyer's lawyers prior to execution. Even if signed, a court may find that the waiver clause was not brought to the buyer's specific attention.[66] Citing a 1985 Fifth Circuit Case, the Western District found that the safeguards that protect nonbusiness consumers are more stringent than those protecting businessmen. A waiver of the warranty against redhibitory defects must nevertheless be scrutinized very carefully to make sure that the third prong of the *Prince* test is satisfied even where the buyer is a businessman. The *Southwest Hospital* court goes on to say:

> In this case, it is difficult to apply the second prong of the *Prince* test to the facts of this case, because there does not appear to be an original "contract of sale." In the absence of an original contract of sale, the court must essentially jettison the second prong of the *Prince* test as inapplicable to the case at hand. Thus, the inquiry must ultimately turn on whether the relevant warranty provisions were brought to Pomarico's attention and explained to him (the third prong of the *Prince* test). This inquiry also provides unique problems which show that this case is distinguishable from most cases construing *Prince*. Unlike in many of the cases which follow *Prince,* this case deals with parties that are arguably more sophisticated than the average consumer. Additionally, while the Hospital, through Pomarico, had at least *some* notice of what the final Limited Warranty might look like, it is uncertain whether Pomarico knew that the

63. Tucker v. Petroleum Helicopters, Inc., 2008-1019 (La. App. 4 Cir. 3/23/09), 9 So. 3d 966, 971, *writ denied,* 2009-0901 (La. 6/19/09), 10 So. 3d 736.

64. *Southwest Louisiana Hosp. Ass'n*, 947 F. Supp. 2d at 670-71.

65. *Id.* at 670

66. *Id.* at 675-676.

> terms in the submittals would definitely be the terms contained in the final Limited Warranty.

The court ultimately held that even construing the evidence before it in a light most favorable to defendant BASF (as is required in considering an SMJ motion), it could not conclude that the hospital had sufficient notice of the waiver to make it effective.[67]

C. "As-Is" Sales

A sale made 'as is' is not a waiver of all warranties.[68] The vendor is not relieved of the Article 2520 implied warranty under that the thing must be fit for the use for which it is intended,[69] nor is it relieved of the warranty against redhibitory defects, and any such waiver must still comply with the Article 2548/*Prince* prerequisites of being clear and unambiguous, in the document of sale, and either brought to the buyer's attention or explained to the buyer. If the thing is used, then logically the implied warranty is not as extensive as it is for new equipment, but the equipment must still operate reasonably well for a reasonable period. So, for example, evidence that the purchaser had to stop using a used car for transportation indicates that it was not fit for its intended use and had a redhibitory defect.[70]

Consequently, any waiver of warranty given with the sale of a used thing, whether it includes *as-is* or not, must follow the strictures of Article 2548 and be strictly interpreted against the seller. The Louisiana Third Circuit held insufficient the testimony of a used car salesman that he orally explained to the buyer of what turned out to be a useless car that it was sold "as is," without the implied warranty and that a used car is like a man that is healthy one day and has a heart attack the next day"[71] Similarly, in another case involving the purchase of a used and defective

---

67. *Id.* at 678. *See also* Chaudoir v. Porsche Cars of N. Am., 95-729 (La. App. 3 Cir. 12/6/95), 667 So. 2d 569, *writ denied sub nom. Chadoir*, 96-0800 (La. 5/31/96), 673 So. 2d 1033 (waiver neither explained nor brought to buyer's attention); Haulin Exotics, Ltd. v. Freightliner Co., No. CIV. A. 94-2936, 1998 WL 395132 (E.D. La. July 10, 1998) (E.D. La. July 10, 1998) (purchase of used 1994 Freightliner truck, but warranty not signed or dated by service manager, and waiver was not brought to buyer's attention); *But see* Ross v. Premier Imports, 704 So.2d 1798 (LaApp. 1 Cir 1997) (As-is used car sale holding that a waiver need not be verbally brought to buyer's attention to be effective, a signature under a block-letter clear waiver is sufficient).

68. Wilks v. Ramsey Auto Brokers, Inc., 48,738 (La. App. 2 Cir. 1/15/14), 132 So. 3d 1009, 1015.

69. *Wilks*, 132 So. 3d at 1015; Ross v. Premier Imports, 96-2577 (La. App. 1 Cir. 11/7/97), 704 So. 2d 17, 21, *writ denied,* 97-3035 (La. 2/13/98), 709 So. 2d 750.

70. *See Wilks*, 132 So.3d at 015.

71. *Pias*, 688 So. 2d at 1105.

car, the court held that the waiver, though written, was ineffective. Specifically, the court found that though plaintiff Brown-Knight had signed a block waiver.

> The waiver of warranty language contained in the bill of sale, which is the only document containing information generally regarded as necessary for a valid waiver of warranty, was written in small, light print, which Brown–Knight demonstrated at trial she was unable to read without her reading glasses. Further, [salesman] Roy admitted that he did not go over the waiver of warranty language in the bill of sale with Brown-Knight and he did not state that he otherwise brought the language to her attention.[72]

In contrast to the oral waiver in *Pias*, in *Ross*, when the used Nissan 300ZX started having problems the day after the purchase and became inoperable a week later, the court found that the buyer had established a redhibitory defect; however, because he was a high school graduate, literate, had it checked by a mechanic, and had signed a detailed block waiver, the court found that he had waived the implied warranty.[73] Note that none of these cases were dismissed on summary judgment motion merely because plaintiff had signed a block waiver, nor should they have been considering the underlying purpose of redhibition as protective of the purchaser. In each of them, the court considered the facts surrounding the waiver to determine both that the waiver was clear and unambiguous and that a reasonable person in the buyer's position would understand that he was taking a chance in purchasing the car in question.

D. Unfortunate and Poorly-Reasoned Decisions

Unfortunately, the *Prince* test includes a disjunctive "brought to the buyer's attention OR explained to him." It would probably be more in keeping with the purpose (to protect consumers) if "and" were used instead, but even so, the reality is that these boilerplate waivers are often incomprehensible and not only does the buyer not understand them, but neither does the seller, unless one or the other is a Louisiana lawyer (as in *Shelton*). Even if the seller understood what such a waiver included, the seller has absolutely no motivation to fully explain it. Under current U.S. law, when you are about to undergo surgery, you have to sign a waiver that essentially says that you understand that the procedure might kill you and that you are willing to take the risk. Those waivers are likely to give

72. Brown-Knight v. Just Add Gas, Inc., 2012 WL 59902732 *8 (La. App. 1Cir. Nov. 29, 2012).

73. *Ross*, 96-2577 La. App. 1 Cir. 11/7/97.

you pause, but generally you sign them because you reason that you will be better off with the surgery and are unwilling or unable to live with the physical ailment you are facing. However, sellers are justifiably hesitant to fully explain an Article 2548 waiver, especially with a vehicle such as an RV that has primarily a non-pecuniary purpose because it is likely to put the kibosh on the sale.

Consequently, when a court simply applies the text of the *Prince* test without fully considering its purpose and the likelihood that the seller knew or had reason to know of the vehicle's defects, its decision is in contravention of the spirit and purpose of the warranty against redhibitory defects (as well as the warranty of fitness for ordinary purposes). For example, in an unreported case, purchasers of a new Sunseeker motorhome discovered shortly after purchasing it that there were gaps in the wall by the driver's seat and by the emergency exit window.[74] They notified the seller, who repaired them, but a few days later, they discovered another opening between the doorframe and wall. Ten days after that was repaired, and while plaintiffs were driving, dashboard alarms and warning lights suddenly started flashing error messages and the cruise control disengaged. The next day, something even more dangerous happened: while driving at seventy-two miles-per-hour on an interstate highway, not only did the warning lights start flashing, but also the Sunseeker braked without warning. The latter problem was repeated twice more in the next few days. Additionally, the leveling jack did not lower, and the house batteries became depleted apparently after only a short period of time, likely meaning one would not have electricity while out in the lovely backwoods of Montana and thus defeating the purpose of having a nice new motorhome in which to 'glamp.' After notifying manufacturer Forest River of these problems, plaintiffs tendered the Sunseeker for repair in Colorado—but the vehicle continued to abruptly break and the generator shut down frequently. After having the generator repaired a month or so later, they drove home and delivered it to the seller for repairs, picking it up several months later, but still the generator had problems, the leveling jacks would not lower, and it again braked to a complete stop abruptly while in motion while flashing warning lights and sounding alarms. Consequently, less than a year after they purchased their Sunseeker, the purchasers filed suit against the manufacturer.

Unfortunately, one of the two purchasers signed two long, exhaustive, and detailed waivers of implied warranties. One was on the

74. Mancuso v. Forest River, Inc., No. CV 21-935, 2022 WL 16834554 (E.D. La. Nov. 9, 2022) (E.D. La 2022 November 9, 2022).

"Custom Delivery and Registration Form" and the other was entitled "This Vehicle is Sold without Warranty: 'As-Is' Waiver of All Warranties." On motion for summary judgment, the court found that the waivers were "clear and unambiguous." It concluded that the buyer's mere signature meant that the waivers were effective and granted summary judgment as to that plaintiff.[75]

While the court did find that the alleged defects were redhibitory, it did not explain why, and it merely dismissed the problems in the living portion as "cosmetic" when that should probably have been an issue of fact for trial.[76] The braking problem was extremely dangerous, and the test that should have been discussed was whether if these were to be proven at trial, could the trier of fact conclude that the thing was absolutely useless or its use so inconvenient that the purchaser would never have bought the Sunseeker. Furthermore, in a motion on SMJ, factual assertions should be interpreted in a light most favorable to the non-movant.[77]

More importantly, there was no discussion of whether the manufacturer knew or should have known of the defects, and no discussion of the purpose underlying the implied waiver against redhibitory defects or the implied waiver of usefulness for ordinary purposes. Again, while this would be an issue of fact for trial, it is highly suspicious that the seller of a new vehicle would sell a brand-new motorhome with absolutely no warranty and as-is, unless he had little or no faith in the product he was selling. Furthermore, manufacturer's acceptance of the Sunseeker several times for (unavailing) repairs despite the no-warranty language indicates that it knew that the Sunseeker had serious problems.

VII. FRAUD AND BAD FAITH

Comment (a) of Article 2545, which stipulates that a manufacturer is deemed to know the thing has a redhibitory defect, indicates that the article was a partial change from the Code of 1870 in that it now allows a buyer to bring an action in redhibition against a seller (or manufacturer) who knowingly made a false declaration concerning a quality of the thing. This does not preclude the buyer from bringing an action for fraud in addition to redhibition if the requirements of Article 1953 are met.

75. *Id.* at *6

76. *See e.g.* Chisum v. Mercedes-Benz USA, LLC, No. CV 18-00661-BAJ-EWD, 2021 WL 1222801 (M.D. La. Mar. 31, 2021) (M.D. La. Mar. 31, 2021).

77. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 765.

Consequently, as discussed earlier, a waiver of implied warranties is ineffective where there are indicia that the seller knew the thing was defective, and there may also be an action for fraud.

In *Minton v. Acosta*, the First Circuit addressed both a waiver of the implied warranty against redhibitory defects and fraud.[78] Plaintiffs purchased a home from defendants and the act of sale included an otherwise effective as-is waiver. The sellers had renovated the home and allegedly presented it as well-built and of high quality. The buyers were prudent and had it inspected before purchase, and the professional inspector did not find any problems with the flooring. However, within two or three months, the buyers noticed bumps in the living room and bedroom floors, and flooring professionals indicated that it would cost approximately $34,000 to repair. Because the seller had purchased the flooring and installed it himself and defendant's partner admitted that they had to repair a bump in the floor at that time, the court found both the existence of a redhibitory defect and that the waiver was ineffective because the defendants knew or should have known of the defect.

Moving on to the fraud claim, the court restated the Civil Code principles of fraud. Article 1953 defines it as a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. In pleading fraud, the circumstances constituting fraud must be alleged with particularity, although knowledge may be alleged generally.[79]

Fraud may result from silence or inaction, but mere silence or inaction without fraudulent intent does not constitute fraud—the fraudulent intent, i.e. the intent to deceive, is a necessary and inherent element of fraud. It need only be proven by a preponderance of the evidence and may be established by circumstantial evidence.[80] Fraud requires proof of three elements: (1) a misrepresentation, suppression, or omission of factual information; (2) the intent to obtain an unjust advantage or cause loss or inconvenience to the other; and (3) the error induced by the fraud have substantially influenced the other party's consent—i.e. it must be a cause of the other party's consent.[81] In *Minton*, the trial court explicitly found that the defendants knew or should have known of the problems with the floor and intentionally did not disclose them, which constituted an omission of factual information, and that erroneous information substantially influenced the plaintiffs' consent to

78. 323 So.3d 721 (La. App. 1 Cir. 2022).
79. Minton citing LA. CODE CIV. PROC. ANN. art. 856.
80. LA. CIV. CODE ANN. art. 1957.
81. *Shelton*, 798 So. 2d at 64.

purchase the house. Thus, the plaintiffs were due not just the difference in price, they were also due damages and attorneys' fees under both fraud and the implied warranty against redhibitory defects.

In *Minton*, plaintiff was able to establish through witness testimony that defendant must have known of the floor's tendency to buckle, but the discussion of the connection between fraud and Article 2548 in *Boos v. Benson Jeep-Eagle* is a bit more helpful as it illustrates that all that is necessary to establish Article 2548 fraud is constructive knowledge of the defect on the part of the seller, not necessarily intentional deception and actual knowledge of the defect—nor was there an identification of a particular statement by seller that the thing had a quality he knew it did not have. The latter two are necessary, as previously discussed, where the plaintiff wants to bring an action in fraud as well as in redhibition.

In *Boos*, the purchaser of the used Mazda 626, after signing two very detailed and obvious waivers, found that the car had sustained significant flood damage and had continuing transmission and electronic problems. The Louisiana Fourth Circuit said: "A seller with knowledge of a redhibitory defect who, rather than informing the buyer of the defect, opts to obtain a waiver of the warranty implied by law, commits fraud, which vitiates the waiver because it was not made in good faith . . . Contracts must be performed in good faith" (citing LA. CIV. CODE ANN. art. 1983).[82] Thus, an actual declaration is not necessary, as interpreted, it is enough that a seller kept silent when he or she should have disclosed: "A seller with knowledge of a redhibitory defect who, rather than informing the buyer of the defect, opts to obtain a waiver of the warranty implied by law, commits fraud, which *vitiates the waiver because it is not made in good faith*."[83]

It is not necessary that vendor have actual knowledge of the undisclosed defect to void the waiver of warranty. If the vendor should have known of the undisclosed defect—i.e. if the vendor had mere constructive knowledge of the undisclosed defect, it is sufficient to void the waiver of warranty. Particularly with respect to used car dealers, a plaintiff would expect that the seller had inspected the car and thus the burden is on the seller to show that that expectation is unreasonable or would not have uncovered the redhibitory defect.[84]

82. *Boos*, 717 So. 2d at 665.

83. *Boos* at 665 quoting Helwick v. Montgomery Ventures Ltd., 95-0765 (La. App. 4 Cir. 12/14/95), 665 So. 2d 1303, 1306, *writ denied,* 96-0175 (La. 3/15/96), 669 So. 2d 424.

84. *Boos*, 717 So. 2d at 666.

> [W]here it is reasonable to expect that an inspection was made by the used car dealer, the burden is on the vendor of used cars to show that a reasonable inspection was made and no defects were discovered, or that no inspection was made but the defect was of such a nature that, more probably than not, it would not have ben discovered by such an inspection. Placing the burden of proof on the vendor in these circumstances will discourage fraud and consumer abuse in an area of commerce that is particularly vulnerable to such possibilities, not to mention the fact that proof of the existence and results of any such inspections is completely within the control of the vendors of used vehicles.

Under these circumstances, the Fourth Circuit affirmed the trial court's denial of the defendant's summary judgment motion.[85]

Logically, the Article 2548 implied duty to speak applies to manufacturers as well as used car salesmen, especially as manufacturers are deemed to know of any defects in their products. In *Bunge Corp. v. GATX Corp*., 557 So. 2d 1376, 1382 (La. 1990), the Louisiana Supreme Court stated that manufacturers as well as vendors have long been held responsible for the implied warranty against defects of which they had knowledge at the time of transaction. There is no question that they have a duty to warn of those defects; failure to do so is fraud. In that case, a contractor had warranted that the grain storage tank it built was suitable for its intended purpose. When it ruptured, causing $4,928,000 in damages and an additional $10 million in business and property loss, defendant was held liable for fraud as well as a breach of express warranty.

VIII. IMPLIED WARRANTY OF ORDINARY USE

In addition to the traditional warranty against redhibitory defects, since 1993 (or perhaps since *MBNA*), a buyer may also sue his seller for a breach of the warranty of fitness under which the seller has a general responsibility to ensure that the thing he sells is fit for its intended use, which means its ordinary and customary use.[86] Though this remedy may seemingly be patterned after the common law doctrine of the same

85. On the other hand, a mere failure to disclose when the buyer had an opportunity to inspect and did not behave as a reasonably prudent buyer would in that situation, the waiver was effective and the buyer did not have a cause of action for fraud. (The purchase of an older apartment complex on St. Charles Ave. in New Orleans. Cook v. Charan Indus., Inc., No. CIV. A. 98-2048, 1999 WL 420384 (E.D. La. June 23, 1999), *aff'd,* 220 F.3d 586 (5th Cir. 2000) (E.D. La. June 23, 1999)).

86. *Odinet, supra* note 10 at 760.

name,[87] revision comments (a) and (c) of Article 2524 specify that it does not change the law and is not the same as the common law remedy because it does not carry the quasi-delictual overtones for which the common law principle is known. However, Article 2524's stipulation that the buyer's rights are "governed by the general rules of conventional obligations" has puzzled scholars and courts since that time. In fact, two scholars have even suggested that it be repealed,[88] but for the reasons that follow, this Article argues that it serves a purpose, though a legislative tweak would be helpful.

Scholars disagree as to the reason or usefulness of the warranty of fitness for ordinary purpose set forth in Article 2524. Some have posited that it was likely incorporated in an effort to comply with modern commercial understandings and is thus a claim separate and apart from redhibition.[89] One scholar has indicated that though five cases are cited in the comments to Article 2524 in support of its claim that this implied warranty has a strong history in Louisiana,[90] it was only "a jurisprudential gloss on redhibition" and subsequent jurisprudence does not suggest otherwise.[91]

A more reasoned scholarly interpretation was probably that of Professor George Bilbe, who suggested that the warranty of fitness was separate but "not unrelated to" the warranty against redhibitory defects. His opinion is based on the introduction prepared by the Louisiana Law Institute at the time[92] and a close analysis of two Louisiana Supreme Court cases discussed in connection with the article. In *Rey v. Cuccia* (the trailer that rattled apart shortly after purchase), the Court stated that "the seller is bound by an implied warranty that the thing sold is free from hidden defects and is *reasonably fit for the product's intended use."*[93]

Hobb's Refrigeration involved a rebuilt air conditioning compressor

87. *Odinet* at 760.

88. *See id.*; Sara Daniel, Comment, *A Warranty Expired: Time to Rid Louisiana of Fitness for Ordinary Use*, 79 LA. L. REV. 281 (2018).

89. *Odinet* at 764.

90. Comment (a) to Article 2524 lists the following as examples of when courts have confused the warranty of fitness with redhibition: Crawford v. Abbott Auto. Co., 157 La. 59, 101 So. 871 (1924); Jackson v. Breard Motor Co., 167 La. 857, 120 So. 478 (1929); Falk v. Luke Motor Co., 237 La. 982, 112 So. 2d 683 (1959); Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955); Media Production Consultants, Inc., 262 La. 80 (*MBNA*). Comment (c) in contrast, lists *MBNA* as well as Hobb's Refrigeration & Air Conditioning, Inc. v. Poche, 304 So. 2d 326 (La. 1974) as examples of when it had been properly used.

91. *Odinet* at 764-65.

92. *Bilbe*, *supra* note 10, 54 LA. L. REV., at 138-39.

93. *Bilbe* at 139, quoting *Rey* at n. 87.

that failed after only three days. The Court first found that the existing "*law-created implied warranty of fitness*" applied, and then approved the district court's conclusion that in failing after only three months, the unit "*did not comply with the implied warranty of fitness for its intended purpose*." This is consistent with current jurisprudential principles that even a used thing must work for a reasonable period of time.

In Bilbe's view, *Hobb's*, more than any of the others, suggested the jurisprudential existence of an implied warranty of fitness separate and apart from redhibition. Nevertheless, in concluding that the failure of the compressor could be attributed to defects in the original design, rebuilt parts, or reassembly, the Louisiana Supreme Court's reasoning can be characterized as including a new implied warranty of fitness in the law of redhibition. Thus, it means that the buyer of an item that does not function for as long as it should reasonably be expected to last has recourse through the "ordinary fitness" implied warranty and thence to redhibition without the necessity of proving that the item was defective when sold.[94]

The difference would be that under the language of the third paragraph of art. 2524 concerning remedies "governed by the general rules of conventional obligations," the buyer of a thing that fails after a short period of time could ostensibly seek damages for non-performance and dissolution of the sale as a non-conforming thing.[95] Consequently, there is a lack of clarity with respect to the effects of a violation of the implied warranty of usefulness for ordinary purposes: should a court grant redhibition remedies or contractual remedies? Courts have gone both ways since the revision. Were the LSLI and the legislature to revisit anything discussed in this article, either clarifying the extent to which the "general rules of conventional obligations" apply—or eliminating the clause—would be helpful.

While the Article 2524 warranty of fitness for ordinary use does not indicate any requirements for a waiver, some courts have since assumed that some of the redhibition principles apply; this assumption is reasonable as in general, Article 13 of the Civil Code in Chapter 2 on interpretation of laws requires that "[l]aw on the same subject be interpreted in reference to each other."[96] the requirements indicated in Article 2548 apply as do the Article 2534 prescription limitations and the Article 2545 presumption of knowledge on the part of a manufacturer. *SW Hospital* apparently assumed that the one-year prescriptive period

94. *Id.* at 140

95. *Bilbe* at 141.

96. *See also* LA. CIV. CODE ANN. art. 2050 on the interpretation of contracts, similarly stipulating that provisions should be interpreted in context with other contractual provisions.

applied, as did the *Prince* waiver requirements. In doing so, the *SW Hospital* court held that the two remedies are not mutually exclusive, a conclusion consistent with Professor Bilbe's predictions.

On the other hand, other cases have focused on Article 2524's last sentence and the revision comments (b) and (c) that the warranty of fitness is not the common law warranty and is (1) intended to be used where the thing is unfit though not defective; and (2) that the buyer's rights are therefore governed by the general rules of conventional obligations. For example, in *ExPert Riser Sols., LLC v. Techcrane Int'l, LLC*, 2019-1165 (La. App. 1 Cir. 12/30/20), 319 So. 3d 320, the defendant had agreed to manufacture a new crane with additional design strength and capacity for plaintiff's job, but the crane as delivered was too weak for the job and repairs were unsuccessful. In considering claims based on the Louisiana Products Liability Act, redhibition, and the implied fitness for ordinary/particular use, the court found that while redhibition had prescribed, the claim was grounded not in defect (and therefor not redhibition). However, Art 2524/2529 (not of kind specified) indicates that the buyer's rights are governed by the rules of conventional obligations. Thus, as the crane did not conform to the contract of sale, the buyer's claim sounded in breach of contract and had the ten-year liberative prescriptive period.

Even if we accept that the two remedies overlap in part, the fact that courts find the two remedies and their overlap (or lack thereof) confusing has led to inconsistent results. In *Cunard Line Ltd. V. Datrex, Inc.*, 926 So. 2d 109 (La. 3d Cir. Ct. App. 2006), Cunard had hired Datrex, Inc. to install a lighting system on one of its cruise ships, but the system did not work, and Datrex could not repair it. Ultimately the system was removed, and Cunard contracted with another company. Using reasoning like that in ExPert Riser, the Third Circuit assumed that redhibition and usefulness for ordinary purposes were two separate remedies—that the Louisiana legislature would not have intended for them to overlap—and that the proper prescriptive period for a usefulness warranty is ten years. However, plaintiffs' briefs kept insisting that the system was "defective." The court initially concluded that a claim for redhibition had prescribed and then turned to considering the usefulness claim. It concluded that as the system was 'not suitable for ordinary use or intended use or particular purpose because it was defective, the claim was grounded in redhibition and therefore prescribed.[97] While grounded in standard common law interpretive canons, this case is inconsistent with those canons as the result

97. Cunard Line Co., 926 So. 2d at 113.

is to judicially legislate Art 2524 out of existence, and it has since been criticized.[98] Regardless of plaintiff attorneys' inartful use of the term "defective," the facts were that the system never worked as promised and no defect was identified. The underlying purpose of both implied warranties is to hold manufacturers and sellers of products that do not work accountable, whether the product has some unknown defect such that it shakes apart soon after purchase (*Rey v. Cuccia*); it starts rusting even before the building is finished (*SW Hospital*); or it never works (*Cunard*).

Why exactly the Louisiana legislature decided to draft the implied warranty of fitness for ordinary use with this ambiguity is lost in the intervening years—if it was even a conscious decision.[99] It seems to have been a last-minute addition.[100] Logically, the fitness language itself is one that lawyers and judges trained in both common and civil law are and were familiar with and therefore used in discussing such issues, so it is reasonable that it be incorporated into the Code and that may have been the primary motivation for doing so without deep discussion or thought as to how exactly it would work in connection with redhibition. Certainly, that was how the phrase "fit for ordinary purposes" had been used previously, as referenced in *MBNA*, *Rey v. Cuccia*, and similar cases. The provision in Art 2524 allowing for reach into ordinary contractual remedies may simply have been intended to provide further protection for purchasers by allowing them to end-run the strict limitations of redhibition, especially where a manufacturer is involved and the prescriptive periods of art. 2534 so short.

A. Stone Energy Corp. v. Nippon Steel[101]

Recently, in *Stone Energy*, the Western District of Louisiana took a deep dive into post-revision jurisprudence on the Louisiana warranty of fitness for ordinary use and came up with three options for dealing with the interaction between it and redhibition, reasoning that none of the options are perfectly ideal because each either violates a maxim of interpretation or does violence to another Codal article. The three options include the historical approach, the textual approach, and the forced distinction.

98. *See* Stone Energy Corp. v. Nippon Steel, 475 F. Supp. 3d 563, 575 (W.D. La. 2020).
99. *Stone Energy Corp.*, 475 F. Supp. 3d at 572.
100. *See Daniel*, *supra* note 88.
101. 475 F. Supp. 572-75.

The historical approach, grounded in *Rey* and *Hobbs*, indicated that there is an underlying assumption that even a used item like an AC compressor should be expected to last a reasonable length of time and that the buyer should not be forced to identify defects in the item as delivered. Revision comment (a) of Article 2524 supports this interpretation, leading to the understanding that redhibition subsumes the "separateness" of the ordinary fitness warranty, thus obviating Article 2524's third paragraph concerning conventional contracts rules.

Under the textual approach, according to the Western District, the court looks solely at the text of Article 2524, ignoring other articles in this chapter. Under this reading, there is indeed a change in the law, thus contradicting Comment (a) of Article 2524. Thus, there are greater remedies available when a seller delivers a thing that is not reasonably fit for its ordinary use. In addition to contradicting Comment (a), this interpretation has other problems. If a thing sold has redhibitory defects, it is also unfit for its ordinary use, in which case under Article 2524, an aggrieved buyer has the advantage of both the ten-year general prescriptive period and damages (though not the bad-faith seller attorneys' fees). So, the buyer then has a choice of which remedy it wants to choose—depending on timing and whether he or she can allege a bad-faith seller. *Stone Energy* argues that the textual approach allows the warranty of fitness to subsume redhibition except when the seller is in bad faith.

Stone's third option for resolving the interface between the two implied remedies, the forced distinction, relies on Article 2524 comment (b), which stipulates that "when the thing is not fit for its ordinary use, even though it is free from redhibitory defects, the buyer may seek dissolution of the sale and damages . . . under the general rules of conventional obligations." This, *Stone* posits, is somewhat consistent with what is known about what the small group of Law Institute Council members sought to achieve and is recognized in the *Cunard* line of cases. However, it has its own problems. *Cunard* and the cases that have followed it distinguish between a thing that is defective (redhibition) and a thing that simply does not work (warranty of fitness). *Stone* posits that this logically is a distinction without a difference—it demonstrated this reasoning and also noted that the *Cunard* court's analysis of plaintiff's complaint was shallow, based solely on the fact that the complaint used the word "defect"—the lighting system was "defective" because it didn't work. Under this line of reasoning, again, redhibition would subsume the warranty of fitness for ordinary purpose.

Ultimately, the Western District decided to endorse the textual approach. Given the "troubled history" behind the warranties, the court stated:

> The legislative history behind the law is unclear and contradictory at times so interpretations based on the history should be avoided. The Court must give meaning to the law as the legislature passed it, and this Court is convinced that the Louisiana Supreme Court would do the same. Although this solution is not perfect, no interpretation of this law is, and the legislature should address these troublesome warranties.

While the Western District's analysis is helpful, it is not fully persuasive because it does not consider the purpose of the revision, however unartfully it was drafted. Article 10 of the Civil Code stipulates that "when the language of the law is susceptible of different meanings, it *must* be interpreted as having the meaning that best conforms to the purpose of the law" (emphasis added). Furthermore, Article 4 stipulates that in absence of legislation or custom, when no rule for a particular situation can be derived, the court is bound to proceed according to equity," and resort is to be made to "justice, reason, and prevailing usage." And finally, of course, Article 1983 requires that contracts must be performed in good faith.

The obvious purpose of the warranty was to incorporate language used in prior cases such as *MBNA,* and in keeping with the underlying purpose of redhibition and all implied warranties, to provide remedies for those instances where sellers and manufacturers take unfair advantage of purchasers—offset by allowing for the modern more sophisticated buyer to be able to waive such protections where appropriate to do so.

In general, courts look to three methods in interpreting statutes when they lack the strictures of Civil Code Articles 9-13 to guide them: textual interpretation (including the canons of interpretation), legislative history, and the purpose or policy underlying the statute.[102] Here, the text is unclear, as is the legislative history, but the purpose is not. Reasoning as the LSLI likely did, the redhibition rule that a buyer must show that the item was defective when purchased could easily be interpreted in such a way as to make it next to impossible to establish a claim, which was why the Court in *Rey v. Cuccia* established that the buyer need only establish that the thing did not work as it should have when purchased, and need

102. *See* NADIA E. NEDZEL, LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS (5th ed. Wolters-Kluwer 2021) pp 196-206 and sources cited therein for a more in-depth explanation of the three methods of statutory interpretation and their interpretation.

not identify the exact defect that makes it unusable. The LSLI and the Louisiana legislature were apparently concerned with making sure that given modern purchasing habits, the wide acceptance of contracts of adhesion, and an increasingly global economy, buyers would still have some measure of protection against useless, defective products.

The ambiguity inherent in the Code's provisions and the overlap with redhibition mean that the effects of the warranty of fitness for ordinary purpose are unclear and the resulting jurisprudence has become ambiguous and inconsistent since the 1995 Revision. Thus, in going forward, when faced with similar issues concerning manufacturer's potential liability under either redhibition or the art. 2524 warranty of fitness, courts should demonstrate awareness of this ambiguity and inconsistent jurisprudence but keep at a forefront the fact that the purpose of both concepts is to provide a counterweight to "caveat emptor," especially where it appears that a seller or manufacturer is taking unfair advantage of its customers to put into the stream of commerce an unfit or defective product.

IX. CONCLUSION

Since its inception, the Louisiana Civil Code has provided strong protection for purchasers. In the face of increased commerce and technological progress, the 1995 revision was intended to update the law and perhaps enhance, but not weaken those protections. Contracts of adhesion have become an accepted part of life in the modern world. With great respect for Professor Bilbe (who was one of my professors) and Professor Odinet (one of my former colleagues), waiting for the legislature to clarify the revised articles is an impractical suggestion and generally unnecessary as that is the role of the judicial system. However, legislative clarification of when the general rules of conventional obligations apply to the fitness warranty would help.

In the past fifty-or-so years of the technological revolution, we have come from a time where contracts of adhesion were excoriated at common law to one where they are presumed to be valid as they allow lower prices for consumers (*e.g. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)) and are the only way business can be conducted digitally (see e.g. click-wrap cases and e-commerce rules). The former absolute rejection of a waiver or limitation of warranty discussed in *MBNA* and endorsed by other cases was apparently modified in Article 2548 as it had become expected that many

consumers are sophisticated enough to understand when they give up such rights.

Nevertheless, that concession to the presumed sophistication of modern buyers was offset by the requirement that such waivers be narrowly and strictly interpreted, that the waiver be clear and unambiguous and brought to the buyer's attention—and any such waivers are invalidated by enhanced remedies against sellers and manufacturers who know or should know their product is defective or substandard. If a waiver of implied warranty is apparently drafted in such a way that it would confuse even a reasonably sophisticated buyer, it is invalid. Furthermore, the facts and circumstances surrounding such waivers, the deal itself, and the qualities of both parties should be carefully considered and the burden properly placed on the seller or manufacturer to prove that the waiver was valid, not on the buyer to prove that it was not. Consequently, many such cases should not be dismissed on motion for summary judgment as they are dependent on a number of issues of fact.

Traditionally, some Louisiana legal scholars have seen and bemoaned the influx of common law concepts and language as an intrusion on what they wish was a more pure civilian law.[103] I was honored to know personally, like, and respect Professor Litvinoff a great deal, but I must disagree with the desire to preserve our civilian heritage untainted by common law ideas. That aim fails to recognize that which owners of mixed-breed and 'designer dogs' know: we should instead be celebrating our hybrid vigor—our mixed heritage—as it allows us to enrich and adapt our law through a strong and common-law-like celebration of jurisprudence. Along with the professional suggestions provided by the Louisiana State Law Institute and adopted by the legislature, jurisprudence allows us to update our law continually and adapt it so that it fits new and unique factual situations and remains our law, something the citizens of Louisiana possess, control, and can take pride in.

The pre- and post-revision jurisprudence on manufacturers' liability and implied waivers are in most regards consistent with each other, something the LSLI intended to do. In adopting a warranty of fitness for ordinary purposes, it also showed an intent to continue the tradition of protecting consumers as well as incorporating language already used by the Louisiana Supreme Court. The drafting concerning the exact relationship between the manufacturer's presumption of bad faith and the

103. *See e.g. Odinet*, *supra* note 10 (Odinet's discussion of the common law intrusion of the warranty of fitness for ordinary purposes on civil law as a poor fit in an otherwise logically coherent and complete civil law conception.).

effects of that presumption could have been clearer, as could the intent behind the reference to "general contract principles," but nevertheless, they all demonstrate an intent to allow courts flexibility in protecting consumers while being fair to sellers and manufacturers. The revision comments made it clear that the intent was NOT to adopt the common law's presumption of caveat emptor in allowing for a buyer's waiver of rights or the implied warranty of usefulness for ordinary purposes. The gaps allow courts to develop jurisprudence adjusted for different fact patterns, the true strength of caselaw is its flexibility as opposed to the rigidity of too much regulation. The concern of this Article has been that Louisiana courts should use all three methods of statutory interpretation (textual, legislative history, and public policy). With redhibition, the underlying public policy of consumer protection as balanced against modern sophistication is key.

Moreover, even had the intent been to adopt a common law concept (rather than simply recognize language that is used in Louisiana), to expunge common law concepts from Louisiana's lexicon has not proven to be successful, but adoption has been. The revision of the Conventional Obligations articles allegedly expunged *consideration* from the Code in order to make it clear that we use the civilian *cause* instead, but the former term is still widely used by Louisiana attorneys. Because we have forty-nine other states that use it, we need to be able to communicate with attorneys across the United States, and the concept proves useful in discriminating between irrevocable offers and option contracts, among other things. Detrimental reliance, a common law concept, has been accepted and even welcomed in Louisiana because our courts were unable to understand the very similar civilian doctrine of *culpa in contrahendo*.[104] Furthermore, many of our citizens are happy that Louisiana adopted a form of the trust for purposes of estate planning. Even if it does not always provide clear black letter law, our acceptance of jurisprudence as a *de facto* source of law enables us to constantly endeavor to improve our law, whether as citizens, judges, or legislators; it is through this that we can preserve, protect, and develop the rule of law.[105]

104. Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TUL. EUR. & CIVIL L. F., 97 (1997).

105. *See* NADIA E. NEDZEL, THE RULE OF LAW, ECONOMIC DEVELOPMENT, AND CORPORATE GOVERNANCE (Edwin Elgar 2020) & NADIA E. NEDZEL & NICHOLAS CAPALDI, THE ANGLO-AMERICAN CONCEPTION OF THE RULE OF LAW (Palgrave McMillan 2019) (in-depth exploration of the underlying differences between common law and civil law and their various strengths and weaknesses).