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Expanded Standing Under the Louisiana Unfair Trade Practices Act and Possible Employee Actions Under the Act

INTRODUCTION

The Louisiana Supreme Court's recent decision in *Cheremie Services v. Shell Deepwater Production*¹ resolved a split in the circuits regarding who has standing to bring a private action under Louisiana's Unfair Trade Practices and Consumer Protection Law, commonly referred to as the Louisiana Unfair Trade Practices Act (LUTPA).² Standing is no longer limited to consumers and business competitors but is available to any person who can show any ascertainable loss of money or movable property as the result of another's use of unfair trade practices.³ Because "unfair trade practices" are not statutorily defined and must be determined by the courts on a case-by-case basis,⁴ this expansion in standing creates an opportunity for any number of new kinds of plaintiffs to assert claims under the statute. As such, Louisiana courts have now been tasked with discerning unfair trade practices in unfamiliar and formerly foreclosed contexts, and practitioners have been left to

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1. 35 So. 3d 1053 (La. 2010). It should be mentioned here that the strength of the *Cheremie* ruling as a means of influencing lower courts is somewhat unclear. Chief Justice Kimball did not participate in the deliberation of the opinion and three justices concurred in the result, indicating that only three justices subscribed to the opinion announcing the judgment of the court. However, both of the justices who assigned reasons in their concurrences referred to the opinion as being that of a "majority." *Id.* at 1064–65 (Johnson, J., concurring); *Id.* at 1065 (Guidry, J., concurring). Justice Weimer, in the opinion referred to as that of the majority, uses the phrase "we hold" in announcing the rejection of the business competitor/consumer limitation on standing under the Louisiana Unfair Trade Practices Act. *Id.* at 1054. He further states that "contrary holdings are hereby repudiated." *Id.* at 1058. At least one Louisiana appellate court opinion and three U.S. District Court opinions have recognized *Cheremie* as abrogating the business competitor/consumer limitation on standing. *See Corley v. Se. Metals Mfg. Co., Inc.*, 2011 WL 3665015, at *4 (W.D. La. Aug. 19, 2011); *Adm'rs of the Tulane Educ. Fund v. Biomeasure, Inc.*, 2011 WL 3268108, at *6 (E.D. La. July 28, 2011); *Home Builders Ass'n v. Martin*, 2010 WL 5109987, at *1 (W.D. La. Dec. 8, 2010); *Bogues v. La. Energy Consultants, Inc.*, 2011 WL 3477033, at *3 (La. Ct. App. 3d Aug. 10, 2011). One U.S. District Court has noted in passing that the Louisiana Supreme Court was "evenly divided" on the issue in *Cheremie*, and that the argument that LUTPA actions are limited to business competitors and consumers "may no longer be sound." *Abene v. Jaybar, LLC*, 2011 WL 2847436, at *5 n.5 (E.D. La. July 14, 2011).

2. LA. REV. STAT. ANN. §§ 51:1401–26 (2003 and Supp. 2011).

3. *Cheremie*, 35 So. 3d at 1058.

4. *See infra* Part I.B.1.

wonder whether, and to what extent, this ruling has “open[ed] the ‘litigation floodgates.’”⁵

This Comment examines the *Cheramie* decision with the purpose of identifying what practical effect the Court’s ruling will have on the future use of Louisiana’s unfair trade practices law by private litigants. After analyzing the language of the decision, the Comment exposes some of the decision’s more important implications for LUTPA by suggesting some potential avenues by which employees may exploit the recent expansion in standing under the statute. While employees are not the only class of potential plaintiffs to whom private actions under the statute may now be available, past attempts by employees to use LUTPA⁶ suggest that they will certainly be among the first to test the statute’s applicability now that the jurisprudential rule denying them standing has been abrogated.

Three possible employee actions under LUTPA are of immediate concern. First, in certain circumstances, Louisiana employees may now have a new statutory alternative to the tort of wrongful discharge in violation of public policy.⁷ Second, employees might use LUTPA as a vehicle to bring actions for violations of other statutes that do not themselves provide a private right of action.⁸ Finally, a current or former employee who has not yet become a competitor of his employer may now be able to bring a LUTPA action in response to the employer’s threatened enforcement of an overbroad noncompetition agreement.⁹

I. BACKGROUND

Before delving into a discussion of the *Cheramie* decision’s implications for future private actions under the Louisiana Unfair Trade Practices Act, some background information will be instructive. This section first provides a brief look at the history

5. James R. Chastain & Linda Perez Clark, *Louisiana Supreme Court Interprets Unfair Trade Practices Act*, LOUISIANA LAW BLOG (Sept. 14, 2010), <http://www.louisianalawblog.com/commercial-litigation-louisiana-supreme-court-interprets-unfair-trade-practices-act.html>.

6. See *Davis v. Manpower Int’l, Inc.*, 623 So. 2d 946, 947 (La. Ct. App. 4th 1993), *writ denied*, 629 So.2d 1173 (La. 1993) (denying LUTPA standing to an employee terminated by new employer after she helped the new employer obtain her former employer’s client list); *Gil v. Metal Service Corp.*, 412 So. 2d 706, 707 (La. Ct. App. 4th 1982), *writ denied*, 414 So. 2d 379 (La. 1982) (denying LUTPA standing to an employee alleging that his termination had been “in furtherance” of his employer’s unfair trade practices).

7. See *infra* Part III.B.

8. See *infra* Part III.C.

9. See *infra* Part III.D.

and development of state unfair trade practices laws. This survey is important for understanding the context in which the Louisiana statute was enacted and provides the bulk of the few extant clues as to the legislature's intent for the statute. This background discussion also covers some of the more important aspects of the Louisiana statute, including what conduct the statute prohibits, the special role of the courts in interpreting the statute's broad prohibition, and the parameters of the private action under the statute. This section then addresses the development of the circuit split on the issue of standing to bring a private action under the statute.

A. *State Unfair Trade Practices Acts*

By the middle of the 20th century, the increasingly impersonal modern marketplace had thrown the conventional legal remedies for consumer controversies into a state of cost-prohibitive obsolescence.¹⁰ That is, advances in production and transportation created a marketplace where businesses, increasing in size and distance from the consumer, were less susceptible to the traditional discipline of "good will." Thus, consumers were more vulnerable to minor yet frequent harms whose remedies would not be worth the expense of litigation.¹¹ Sensing the growing need for a new approach to consumer protection, the legislatures of the various states, starting in the late 1950s, began to enact statutes designed to prohibit unfair and deceptive trade practices.¹² These acts, which came to be termed "Little FTC Acts," were largely based on section 5 of the Federal Trade Commission (FTC) Act, which prohibits "[u]nfair methods of competition . . . and unfair or deceptive acts or practices,"¹³ though other model unfair trade practices acts also provided some guidance.¹⁴ The Federal Trade Commission is said to have encouraged the enactment of these laws on account of the Commission's scarce budget resources and

10. See William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 (1972) ("In most consumer controversies the risks and expenses of investigation, counsel, and litigation far outweigh the likely recoveries that could reasonably have been anticipated with traditional actions for warranty, misrepresentation, or fraud.").

11. *Id.*

12. See Jeff Govern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 446 (1991).

13. 15 U.S.C. § 45(a)(1) (2006).

14. See Govern, *supra* note 12, at 446–52; see also Council on State Governments, *Model Unfair Trade Practices and Consumer Protection Act*, 1970 Suggested State Legislation 141.

inability to monitor local conditions effectively.¹⁵ By 1981, every state had enacted an unfair trade practices statute.¹⁶

In an effort to adequately ensnare the wide variety of possible unfair and deceptive trade practices, the federal statute, upon which the state laws were based, was drafted in intentionally broad language, leaving the determination of what actually constituted a violation of the statute up to the Commission and the courts.¹⁷ The U.S. Supreme Court has noted that both the House and the Senate deliberately refused to give any particular definition to “unfair methods of competition” or “unfair or deceptive acts or practices” when adopting this section of the FTC Act.¹⁸ Congress understood that the realities of modern trade demanded an appropriately malleable prohibition because “[t]here is no limit to human inventiveness in this field.”¹⁹ Crafted in the pattern of their broadly worded federal forerunner, most state unfair and deceptive trade practices acts are laws of similarly expansive applicability.²⁰

Like the FTC Act, state unfair trade practices statutes usually provide a framework for enforcement by a public authority, most often the state’s attorney general.²¹ One significant difference, though, between state unfair trade practices acts and the FTC Act is that in every state except Iowa, the state acts permit private actions.²² The inclusion of private rights of action in state unfair trade practices laws was intended to ensure that enforcement of the statute’s prohibitions would not be circumscribed by the often limited resources of state attorneys general and other enforcement agencies.²³ Some state statutes only permit injunctive or other equitable relief to private litigants, while others permit actions for damages.²⁴ Many allow for class action suits, and a few permit

15. Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L. J. 125, 126 (1987).

16. Sovern, *supra* note 12, at 446.

17. See H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep.).

18. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972).

19. *Id.* (quoting H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep.)). The House Conference Report continued: “Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.” H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep.).

20. Sovern, *supra* note 12, at 446–52.

21. See LA. REV. STAT. ANN. § 51:1404 (Supp. 2011); CONN. GEN. STAT. § 42-110d (Westlaw 2011).

22. STATE UNFAIR TRADE PRACTICES LAW (CCH) ¶1700 (2007).

23. See *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 776 (Mass. 1975), where the Massachusetts Supreme Judicial Court stated that a primary motivation behind the adoption of the private right of action in that state was the state’s attorney general’s inability to handle the volume of complaints received.

24. STATE UNFAIR TRADE PRACTICES LAW (CCH) ¶1700 (2007).

third parties to bring suit.²⁵ The opportunity to recover attorney's fees is another common characteristic of private actions under state unfair trade practices acts.²⁶ The availability of damages, attorney's fees, and class actions under the state acts are intended to ensure the economic viability of private enforcement.²⁷

B. The Louisiana Unfair Trade Practices Act (LUTPA)

Louisiana's Unfair Trade Practices and Consumer Protection Law²⁸ was enacted in 1972 and is in many ways a typical state unfair trade practices statute.²⁹ Among other things, the 1972 legislation created a new consumer agency and Consumer Advisory Board and enacted a deceptive trade practices statute to be enforced by the state's attorney general, the consumer agency, and the parish district attorneys.³⁰ The legislation also created a new private right of action under the statute.³¹

1. Prohibited Conduct

Louisiana Revised Statutes section 51:1405(A) curtly states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."³² Thus, LUTPA's prohibition against unfair acts or practices is as broadly worded as the FTC Act.³³ In fact, the language chosen by the legislature for the definition of unlawful conduct comprised the most general of the alternative definitions offered by the Model Unfair Trade Practices and Consumer

25. *Id.*

26. Lovett, *supra* note 10, at 744.

27. *Id.* See Lovett, *supra* note 10, at 743–46, for a theoretical framework within which to weigh the policy values of the various approaches to encouraging private enforcement by reducing the risks to potential claimants and increasing the costs to purported violators (i.e., allowing for the recovery of attorney's fees, the possibility of punitive damages, and the use of representative or class actions). See Govern, *supra* note 12, at 449–52, for a criticism of the use of FTC standards by state courts to define deceptive practices in private actions under the state acts, arguing that this practice tips the cost–risk balance too far in favor of potential claimants.

28. LA. REV. STAT. ANN. §§ 51:1401–26 (2003 and Supp. 2011).

29. Patrick D. Breeden & William A. Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law*, 20 LA. B. J. 307 (1973).

30. *Id.*

31. *Id.*

32. LA. REV. STAT. ANN. § 51:1405(A) (Supp. 2011).

33. See 15 U.S.C. § 45(a)(1) (2006) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

Protection Act.³⁴ The model legislation's explanatory comments indicate that the chosen language "enables the enforcement official to reach not only deceptive practices that prey upon consumers, but also unfair methods that injure competition."³⁵

Given the broad language of this prohibition, it has been left to the courts to decide, on a case-by-case basis, what conduct constitutes a violation of the statute.³⁶ The standard formulated by the courts for discerning LUTPA violations is almost as ambiguous as the statute itself, targeting conduct that "offends established public policy and . . . is immoral, unethical, oppressive, unscrupulous, or substantially injurious."³⁷ Courts have also held that in order to recover under LUTPA, a plaintiff must prove "some element of fraud, misrepresentation, deception, or other unethical conduct" on the part of the defendant.³⁸

The reach of these standards has been limited somewhat by the jurisprudential qualifications that the statute does not (1) prevent a business from pursuing a profit, even at the expense of its competitors, so long as the means used are not "egregious," or (2) provide an alternate remedy for simple breaches of contract.³⁹ Beyond this, Louisiana Revised Statutes section 51:1406 exempts from LUTPA's purview "[a]ny conduct which complies with section 5(a)(1) of the Federal Trade Commission Act."⁴⁰

Examples of conduct found by Louisiana courts to constitute unfair and deceptive trade practices include an attempt by an auto repair garage to charge a customer twice for the same work,⁴¹ a creditor's "repeatedly suing for a balance that the creditor knows is

34. See Breeden & Lovett, *supra* note 29, at 312.

35. Council on State Governments, *Model Unfair Trade Practices and Consumer Protection Act*, 1970 Suggested State Legislation 142.

36. *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So. 3d 1053, 1059 (La. 2010); *Strahan v. State Dep't of Agriculture and Forestry*, 645 So. 2d 1162, 1165 (La. Ct. App. 1st 1994).

37. *Cheremie*, 35 So. 3d at 1059 (quoting *Moore v. Goodyear Tire & Rubber Co.*, 364 So. 2d 630, 633 (La. Ct. App. 2d 1978)). The first use by a Louisiana court of this oft-quoted standard can in fact be traced to the Second Circuit's decision in *Moore*. However, it should be noted that the court there, in an effort to give the words of the Louisiana statute their "common meaning," simply adopted the standard articulated by prior U.S. Supreme Court decisions interpreting the correlative portion of the FTC Act. 364 So. 2d at 634.

38. *Cheremie*, 35 So. 3d at 1059 (quoting *Dufau v. Creole Engineering, Inc.*, 465 So. 2d 752, 758 (La. Ct. App. 5th 1985)) (emphasis added).

39. *Cheremie*, 35 So. 3d at 1060 (quoting *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993)).

40. LA. REV. STAT. ANN. § 51:1406(4) (Supp. 2011).

41. *Joseph v. Hendrix*, 536 So. 2d 448, 450 (La. Ct. App. 1st 1988).

more than the amount due,⁴² the wrongful repossession of a collateral,⁴³ and both the collection and dissemination of confidential information from the trash of a competing firm.⁴⁴ The violation of a statute closely related in purpose to LUTPA may also be found to be an unfair trade practice.⁴⁵

2. *The Private Right of Action*

Louisiana Revised Statutes section 51:1409(A) provides that:

Any person who suffers any ascertainable loss of money or property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually, but not in a representative capacity to recover actual damages.⁴⁶

LUTPA defines the word “person” as “a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity.”⁴⁷ Louisiana courts have yet to define “ascertainable loss” as used in the statute, though the courts of other states consider it to mean that the loss is “capable of being discovered, observed, or established.”⁴⁸ Damages have been awarded under the statute for a variety of things, including lost wages and mental anguish and humiliation.⁴⁹

If a party bringing a private action under LUTPA is ultimately awarded damages, the statute also entitles the party to reasonable attorney’s fees and costs.⁵⁰ Furthermore, if the court finds that the unfair or deceptive practice was knowingly used—that is, after the defendant had been put on notice by the attorney general—then treble damages must be awarded.⁵¹ However, as a counterbalance to the opportunities for treble damages and attorney’s fees, a court

42. *Chrysler Credit Corp. v. Walker*, 488 So. 2d 209, 213 (La. Ct. App. 4th 1986).

43. *Moore v. Goodyear Tire & Rubber Co.*, 364 So. 2d 630, 631 (La. Ct. App. 2d 1978).

44. *Camp, Dresser & McKee, Inc. v. Steimle & Associates, Inc.*, 652 So. 2d 44, 46 (La. Ct. App. 5th 1995).

45. *See infra* Part III.C.

46. LA. REV. STAT. ANN. § 51:1409(A) (Supp. 2011).

47. LA. REV. STAT. ANN. § 51:1402(8) (Supp. 2011).

48. *Lentini v. Fidelity Nat’l Title Ins. Co. of New York*, 479 F. Supp. 2d 292, 302 (D. Conn. 2007); *Scott v. Western Int’l Surplus Sales Inc.*, 517 P.2d 661, 663 (Or. 1973).

49. *See Slayton v. Davis*, 901 So. 2d 1246, 1255–56 (La. Ct. App. 3d 2005).

50. LA. REV. STAT. ANN. § 51:1409(A) (Supp. 2011).

51. *Id.*

that finds that an action was brought in bad faith or for purposes of harassment may award attorney's fees and costs to the defendant.⁵²

Louisiana Revised Statutes section 51:1409(E) requires a plaintiff to bring his private action under LUTPA within a period of one year from the time of the transaction or act that gives rise to the suit.⁵³ The courts have interpreted this one-year period as being peremptive, rather than simply prescriptive.⁵⁴

3. *The Issue of Standing*

Before the Louisiana Supreme Court's decision in *Cheremie*, there had been a longstanding split in the circuits on the issue of who had standing to bring a private action under LUTPA.⁵⁵ Reading section 51:1409(A)'s grant of standing to "any person" in conjunction with section 51:1402(8)'s all-encompassing definition of "person," it would appear that standing to assert a claim under LUTPA is available to *anyone* who has suffered a loss of money or property due to another person's use of unfair or deceptive trade practices.⁵⁶ Before *Cheremie*, however, only Louisiana's First Circuit Court of Appeal had consistently given such a broad interpretation to LUTPA's grant of standing.⁵⁷ Most other courts

52. *Id.*

53. LA. REV. STAT. ANN. § 51:1409(E) (Supp. 2011).

54. *Mayo v. Simon*, 646 So. 2d 973, 976 (La. Ct. App. 3rd 1994); *Spencer-Ellington, Inc. v. Service Merchandise, Inc.*, 562 So. 2d 1060, 1063 (La. Ct. App. 1st 1990); *Canal Marine Supply, Inc. v. Outboard Marine Corp. of Waukegan, Ill.*, 522 So. 2d 1201, 1203-4 (La. Ct. App. 4th 1988). In contrast with prescriptive periods, peremptive periods may be neither interrupted nor suspended. LA. CIV. CODE art. 3461 cmt. c (2011). The *Canal Marine* court explained that the statute's primary concern with the public interest and also its penal nature militate towards a strict construction of the specified time period. 522 So. 2d at 1203. Furthermore, the court noted that "[i]f the legislature had wanted this time period to be interruptible it could either have said so specifically or have let the ordinary rules of prescription apply by not making special provision for it in the act. It did neither." *Id.* at 1204. See generally Justin M. Woodard, Comment, "Unnecessary to Address"?: Tackling the Louisiana Supreme Court's Open Question of Whether a Continuing Tort Can Suspend the Louisiana Unfair Trade Practices Act's One-Year Peremptive Period, 85 TUL. L. REV. 865 (2011).

55. See Alexander M. McIntyre, Jr., Gerardo R. Barrios, Brian M. Ballay, *Standing Under the LUTPA—The Circuit Split Widens*, 54 LA. B.J. 362 (2007).

56. *Id.* at 363.

57. See *Capital House Preservation Co. v. Perryman Consultants, Inc.*, 725 So. 2d 523, 530 (La. Ct. App. 1st 1998); *Bell Pass Terminal, Inc. v. Jolin, Inc.*, 618 So. 2d 1076, 1081 (La. Ct. App. 1st 1993), *writ denied*, 626 So. 2d 1172 (La. 1993) ("Although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members."); *Roustabouts, Inc. v. Hamer*, 447 So. 2d 543, 548 (La. Ct. App. 1st 1984). *But*

limited standing under LUTPA to “consumers” and “business competitors,” including Louisiana’s Fourth and Fifth Circuit courts of appeal, the federal district courts in Louisiana, and the United States Court of Appeals for the Fifth Circuit.⁵⁸ At least one court suggested that the restriction could be inferred from section 51:1405(A)’s explicit concern with “methods of competition” and acts and practices “in the conduct of any trade or commerce.”⁵⁹ Louisiana’s Second and Third Circuit Courts of Appeal were inconsistent on the issue, giving sometimes broad and sometimes narrow interpretations of LUTPA’s grant of standing.⁶⁰

The opinion rendered by the U.S. District Court for the Eastern District of Louisiana in *Hamilton v. Business Partners, Inc.* provides an excellent analysis of the origins and extension of the business competitor/consumer limitation on standing under LUTPA.⁶¹ The court there correctly traced the limitation back to the Louisiana Fourth Circuit’s 1982 opinion in *Gil v. Metal Service Corporation*.⁶² In *Gil*, an employee brought an action under LUTPA against his former employer, alleging that his termination had been “‘in furtherance’ of deceptive trade practices.”⁶³ The court denied him standing, stating that the statute “has been construed to give protection only to consumers and business competitors.”⁶⁴ As authority for this assertion, though, the court

see Thibaut v. Thibaut, 607 So. 2d 587, 607 (La. Ct. App. 1st 1992), *writs denied*, 612 So. 2d 37, 38, 101 (La. 1993) (holding that individual partners lacked standing under LUTPA because they were neither consumers nor business competitors).

58. *Gardes Directional Drilling v. Turnkey Exploration, Co.*, 98 F.3d 860, 867–68 (5th Cir. 1996); *National Gypsum Co. v. Ace Wholesale, Inc.*, 738 So. 2d 128, 129–130 (La. Ct. App. 5th 1999); *Gil v. Metal Service Corp.*, 412 So. 2d 706, 707 (La. Ct. App. 4th 1982), *writ denied*, 414 So. 2d 379 (La. 1982).

59. *Phillips v. Berner*, 789 So. 2d 41, 49 (La. Ct. App. 4th 2001), *writ denied*, 798 So. 2d 119 (La. 2001).

60. *Compare* *Monroe Med. Clinic, Inc. v. Hospital Corp. of America*, 622 So. 2d 760, 763 (La. Ct. App. 2d 1993), *writ denied*, 629 So. 2d 1135 (La. 1993) (adopting the broad interpretation of standing), *with* *Double-Eight Oil & Gas v. Caruthers Producing Co., Inc.*, 942 So. 2d 1279, 1284 (La. Ct. App. 2d 2006) (limiting standing to consumers and business competitors); *compare* *Doland v. ACM Gaming Co.*, 921 So. 2d 196, 202 (La. Ct. App. 3d 2005) (LUTPA “gives a right of action to anyone who suffers any ascertainable loss of money. . . .”), *with* *Vermillion Hospital, Inc. v. Patout*, 906 So. 2d 688, 693 (La. Ct. App. 3d 2005) (“LUTPA does not grant a right of action to every person or business entity that is a victim of unethical or unfair business practices.”).

61. 938 F. Supp. 370, 372 (E.D. La. 1996).

62. 412 So. 2d 706.

63. *Id.* at 707.

64. *Id.*

only cited two of its own prior decisions, which, in fact, did not address the scope of LUTPA's grant of standing.⁶⁵ Significantly, the *Gil* court did not put forth any rationale for the limitation of standing, simply relying on how the statute had been "construed" in the past.⁶⁶ In 1983, the Louisiana Fifth Circuit cited *Gil* as authority for its limitation of standing to consumers and business competitors in *Morris v. Rental Tools, Inc.*⁶⁷ Again, no rationale was given.⁶⁸ Then, in 1992, the U.S. Fifth Circuit, citing to *Morris*, adopted the business competitor/consumer limitation on standing.⁶⁹ Louisiana's federal district courts were thereby bound to apply the limitation, as was done, albeit reluctantly, by the court in *Hamilton*.⁷⁰

Commentary on private actions for deceptive trade practices contemporaneous with LUTPA's enactment did suggest that the primary concern of both federal and state unfair trade practices laws was redress for consumers and business competitors injured by unfair and deceptive practices.⁷¹ Early commentary on LUTPA also suggested that the statute was designed to protect consumers and competing businesses.⁷² That the legislature intended business competitors and consumers to be the *exclusive* beneficiaries of LUTPA's protections, however, is not made evident by this commentary. A strict reading of the explanatory comments to the model legislation on which LUTPA is based might indicate that standing to bring a private action should be limited to consumers only, as no mention of business competitors is made in the comment explaining private actions.⁷³

65. *Id.* The *Gil* court cited *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. Ct. App. 4th 1979), and *National Oil Service of Louisiana, Inc. v. Brown*, 381 So. 2d 1269 (La. Ct. App. 4th 1980), in which, as the *Hamilton* court noted, the issue of standing did not arise because both cases concerned plaintiffs who were competitors and therefore clearly within the reach of the statute. *Hamilton*, 938 F. Supp. at 372.

66. 412 So. 2d at 707.

67. 435 So. 2d 528, 532.

68. *Id.*

69. *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 975 F.2d 1192, 1205.

70. 938 F. Supp. at 372.

71. See William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271 (1970); Lovett, *supra* note 10, at 730.

72. See James E. Boren, Comment, *The Louisiana Unfair Trade Practice and Consumer Protection Act: An Analysis*, 34 LA. L. REV. 634 (1974); Paul L. Zimmering, Comment, *Louisiana's Consumer Protection Law—Three Years of Operation*, 50 TUL. L. REV. 375 (1975); Breeden & Lovett, *supra* note 29.

73. Council on State Governments, *Model Unfair Trade Practices and Consumer Protection Act*, 1970 Suggested State Legislation 144 ("Section 8 provides for private and class actions, and for payment of attorney's fees and costs, so that the private bar may be brought into the consumer protection field.

Given the divergent and sometimes ill-founded approaches to the issue of standing under LUTPA exhibited in the case law, this area of the law called out for guidance from the Louisiana Supreme Court. Prior to *Cheramie*, though, the supreme court had maintained the circuit split by denying writs of certiorari both to decisions adopting the broad view of LUTPA's grant of standing and decision adopting the limited view.⁷⁴

II. THE *CHERAMIE* DECISION

In April 2010, the Louisiana Supreme Court finally addressed the parameters of LUTPA's grant of standing for private actions. The court's treatment of the issue, however, has left some significant uncertainty as to what may or may not constitute a competent private action under LUTPA in the future.

A. *Development of the Case*

In *Cheramie Services v. Shell Deepwater Production*, an oil industry service provider (Cheramie) brought suit against an oil company (Shell) and a competing service provider (Filco), asserting a number of causes of action arising from alleged acts by and between the two defendants, including one based on their use of unfair trade practices.⁷⁵ Cheramie was one of a number of companies engaged in the business of providing support personnel for activities on offshore drilling platforms.⁷⁶ Its unfair trade practices claim against Shell and Filco alleged collusion between the two to misappropriate Cheramie's employees.

In 1997, Cheramie contracted with Shell "to furnish all tools, equipment, materials, labor and supervision in order to provide the furnishing of clerical support" on Shell's "Auger" tension-leg-platform.⁷⁷ Cheramie then assigned to the platform two clerks who would work alternating 14-day shifts, such that one of them was

Ordinarily, the amount involved in a consumer transaction is not sufficient to interest a private practitioner, with the result that thousands of consumers suffer small losses, without remedy or relief being available.").

74. Compare *Gil v. Metal Service Corp.*, 412 So. 2d 706, 707 (La. Ct. App. 4th 1982), *writ denied*, 414 So. 2d 379 (La. 1982) (limiting standing to consumers and business competitors), with *Jarrell v. Carter*, 577 So. 2d 120, 123 (La. Ct. App. 1st 1991), *writ denied*, 582 So. 2d 1311 (La. 1991) (allowing standing to a plaintiff who was not a consumer or business competitor).

75. 35 So. 3d 1053, 1054 (La. 2010).

76. *Id.*

77. *Id.*

always present on the platform.⁷⁸ Approximately six months later, though, Shell stopped paying Cheramie for the services of the two clerks and began paying Filco for the services of those same two clerks.⁷⁹ Cheramie alleged that Shell's actions in this incident amounted to a wrongful termination of the contract and a breach of contract.⁸⁰

Cheramie also alleged that shortly after this episode involving the two clerks, it submitted a bid to provide a logistics coordinator on another Shell platform and then sent the prospective coordinator to New Orleans to be interviewed for the position by Shell employees.⁸¹ The Cheramie employee attested that she was told during the interview that she would have to work for Filco if she wanted the job, as it was Filco who had actually submitted the winning bid, not Cheramie.⁸² In need of work, the prospective logistics coordinator left Cheramie's employ to work for Filco.⁸³

In 2001, Filco settled with Cheramie for dismissal of the suit.⁸⁴ In 2007, the trial court granted Shell's motion for summary judgment, dismissing the plaintiff's claim in its entirety. Cheramie appealed the trial court's findings that there had been no breach of contract and that LUTPA did not apply.⁸⁵ The Fourth Circuit Court of Appeal affirmed the trial court's judgment on the breach of contract claim but *reversed* the dismissal of the LUTPA claim.⁸⁶ Though Shell argued that Cheramie did not have standing because it was neither a consumer nor a business competitor, the court upheld the LUTPA claim based on the solidary liability of conspiring tortfeasors provided by Civil Code article 2324.⁸⁷ Under the court's rationale, the business competitor/consumer standing requirement was not a bar to Cheramie's claim against Shell because Shell's conspiracy with Cheramie's competitor Filco brought Shell within LUTPA's reach.⁸⁸ This conspiracy theory

78. *Id.*

79. *Id.* at 1055. In support of a motion for summary judgment, the two clerks signed affidavits that attested to the fact that they quit Cheramie Services and went to work for its competitor voluntarily. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 14 So. 3d 1, 10 (La. Ct. App. 4th 2009).

87. *Id.* at 6–9. LA. CIV. CODE art. 2324(A) (2011) provides that “[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.”

88. *Cheramie*, 14 So. 3d at 9.

approach to LUTPA standing was not new and, as the Fourth Circuit noted, could be traced to a line of prior jurisprudence from Louisiana's First, Fourth, and Fifth Circuits.⁸⁹

B. The Louisiana Supreme Court Rejects the Business Competitor/Consumer Limitation on Standing

The Louisiana Supreme Court ultimately rejected the contention that standing under LUTPA should be limited to consumers and business competitors.⁹⁰ More importantly, though, the court held that no person who could assert an ascertainable loss of money or movable property as a result of another's use of unfair trade practices should be barred from bringing a suit under LUTPA.⁹¹ The court reached this conclusion through the simplest method of statutory construction—that based on the plain language of the statute.⁹²

The court first cited Louisiana Revised Statutes section 51:1405(A) to establish the prohibition of “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”⁹³ It then cited section 51:1409(A)'s grant of a private right of action to “any person” who suffers any ascertainable loss of money or property due to another person's violation of 1405(A)'s prohibition.⁹⁴ Finally, the court quoted section 51:1402's definitions of “consumer,” “consumer transaction,” “person,” and “‘trade’ or ‘commerce.’”⁹⁵ Reading these sections together, the court concluded:

An examination of these sections of LUTPA reveals that the legislation contains no language that would clearly and expressly bar a “person” (such as the individual and the corporation that are the plaintiffs herein) from bringing an

89. *Id.* at 7–9; *see* Strahan v. State Through Dep't of Agriculture and Forestry, 645 So. 2d 1162 (La. Ct. App. 1st 1994); Southern Tool & Supply, Inc. v. Beerman Precision, Inc., 862 So. 2d 271 (La. Ct. App. 4th 2003); Camp, Dresser & McKee, Inc. v. Steimle & Assoc., Inc., 652 So. 2d 44 (La. Ct. App. 5th 1995).

90. *Cheremie*, 35 So. 3d at 1057.

91. *Id.* at 1058.

92. The court noted that in an effort to be thorough, it undertook an investigation into LUTPA's legislative history, though it proved inconclusive. *Id.* at 1056, n.4. “Nevertheless, when the words of a statute are clear and unambiguous, the letter of the law is not to be disregarded under the pretext of pursuing its spirit.” *Id.*

93. *Id.* at 1056.

94. *Id.*

95. *Id.* at 1056–57.

action for unfair trade practices. To the contrary, LUTPA grants a right of action to any person, natural or juridical, who suffers an ascertainable loss as a result of another person's use of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members. . . . An evaluation of the words of this statute leads to the conclusion that, consistent with the definition of the word "person," there is no such limitation on those who may assert a LUTPA cause of action.⁹⁶

The statute contained no "clear, unequivocal and affirmative expression" that the private right of action should be limited to business competitors and consumers, and so there could be no such limitation.⁹⁷ Beyond this, the language of the ruling appears to suggest that the relationship between the parties involved will no longer have any effect upon standing to bring a private action under LUTPA. The court's parenthetical qualification of "person" with the phrase "such as the individual and the corporation that are plaintiffs herein" may create some doubt as to the breadth of the court's interpretation of LUTPA's grant of standing, possibly leaving room for the argument that standing under LUTPA should still be limited to business competitors, consumers, and plaintiffs in situations closely analogous to that of *Cheramic*.⁹⁸ But, the general thrust of the opinion evidences an intent to free the phrase "any person" from being a function of the relationship of the parties involved in the dispute.

C. The Court Emphasizes the "Limitations" on LUTPA Actions

The court went on to cite certain aspects of the statute and earlier cases interpreting the statute in order to emphasize the limitations on private actions under LUTPA.⁹⁹ The court first noted that the legislature, in enacting LUTPA, provided "certain limiting features."¹⁰⁰ These "limiting features" are (1) the award of attorney's fees and costs to the defendant in the case of a groundless, bad-faith claim or a claim brought for the purpose of harassment, and (2) the fact that the award of treble damages is

96. *Id.* at 1057.

97. *Id.* at 1058.

98. *Id.* at 1057.

99. *Id.* at 1058.

100. *Id.*

limited to cases where the defendant has previously been put on notice by the attorney general that the conduct in question constitutes an unfair trade practice.¹⁰¹ The reason for the court's mention of these "certain limiting features" is unclear, though it might have been meant to assuage, at least rhetorically, fears that the newly relaxed standing requirements will result in a flood of LUTPA litigation.

The court then stated that after its presently mandated expansion of standing under LUTPA, the true limitation on bringing private actions under the statute will be a plaintiff's burden of showing an unfair or deceptive act or practice, a burden that the court made clear its opinion had not diminished.¹⁰² The problem, of course, is that the standard by which Louisiana courts discern an unfair or deceptive practice is vague and not intended to draw any hard lines.¹⁰³

The court attempted to address the amorphous judicial standard for identifying LUTPA violations, i.e., the rule that LUTPA prohibits conduct that "offends established public policy and . . . is immoral, unethical, oppressive, unscrupulous, or substantially injurious."¹⁰⁴ In doing so, the court stated, in explicit agreement with a concurring justice who did not subscribe to the majority's jettisoning of the business competitor/consumer limitation, that "the range of prohibited practices under LUTPA is extremely narrow."¹⁰⁵ The court made no effort, however, to define the strictures of that narrowness other than echoing the assertion that "[b]usinesses . . . are free to pursue profit, even at the expense of competitors, so long as the means are not egregious."¹⁰⁶ This lack of definition was not helped by the fact that the court's ultimate rejection of the plaintiff's claim actually seemed to be more rooted in the policy of favoring an employee's interests in his own mobility over an employer's competitive interests, rather than any policy or interpretation more broadly applicable to LUTPA claims in general.¹⁰⁷

101. *Id.*

102. *Id.*

103. *See supra* Part I.B.1.

104. *Cheremie*, 35 So. 3d at 1059.

105. *Id.* at 1060.

106. *Id.* (quoting *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993)).

107. *Id.* ("[T]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change. . . . Therefore, only egregious actions involving elements of fraud, misrepresentation, deception, or other unethical conduct will be sanctioned based on LUTPA.").

D. Counterargument in the Concurrence

Three Justices concurred in the result, with two of them assigning reasons.¹⁰⁸ In contending that the court should not have dispensed with the business competitor/consumer limitation on standing, Justice Johnson argued several points.¹⁰⁹

First, she cited “the purpose of LUTPA,” which was “essentially a response to [consumers’] dissatisfaction with their treatment in the marketplace.”¹¹⁰ She then suggested that the references to “competition” and “trade and commerce” in Louisiana Revised Statutes section 51:1405(A) “[indicate] an intent by the legislature to allow business competitors to pursue an action [against] an adversary who has used deceptive trade practices.”¹¹¹ The combination of this legislative intent with the purpose behind the statute was sufficient for Justice Johnson to conclude that standing should be limited to business competitors and consumers.¹¹²

This counterargument is problematic. Although state unfair and deceptive trade practices acts were generated with the immediate purposes of protecting consumers and deterring anticompetitive practices, it does not necessarily follow that standing to bring a private action under LUTPA should be limited to consumers and business competitors. This limitation on standing both restricts enforcement, which the inclusion of private actions was intended to enhance, and artificially narrows the range of activities that fall within the statute’s prohibition, which was intentionally designed to cast a wide net. It is entirely possible that a person who is neither a consumer nor a business competitor may be placed in a position where he is harmed by the conduct of another that is also detrimental to that other person’s consumers or business competitors. For example, an employer who regularly defrauds his customers may need to fire, demote, or deny a promotion to a particular employee who would object to or report the employer’s conduct. If the employer did not do this, he would be unable to continue to engage in the unfair trade practice, and the employee

108. *Id.* at 1064.

109. Justice Guidry simply said that the majority’s discussion of standing under LUTPA was “dicta” because the controversy was disposed of by the Court’s finding that Shell had in fact been entitled to summary judgment on the LUTPA claim. *Id.* at 1065 (Guidry, J., concurring).

110. *Id.* at 1064 (Johnson, J., concurring).

111. *Id.*

112. *Id.*

would therefore be harmed by the unfair trade practice. The *Gil* case, discussed later, provides a prime example.¹¹³

Justice Johnson also gave great weight to the fact that the majority of the prior case law on the issue subscribed to the limited view of standing.¹¹⁴ As discussed earlier, the line of cases restricting standing under LUTPA does not appear to have been grounded in any thoroughly explicated rationale.¹¹⁵ However, the force of this jurisprudence is enhanced by the fact that, as Justice Johnson noted, in the almost 30 years since the rule was first pronounced, the legislature has not amended the statute so as to suggest that the limited interpretation is erroneous.¹¹⁶

III. OPENING THE DOOR TO NEW EMPLOYEE ACTIONS?

After *Cheremie*, “any person,” broadly defined, who can show any ascertainable loss of money or property resulting from another’s use of practices prohibited by Louisiana Revised Statutes section 51:1405 has standing to bring a private action under LUTPA. The fact that violations of section 51:1405 are not legislatively defined and must be determined on a case-by-case basis means Louisiana courts have now been tasked with discerning LUTPA violations in any number of new contexts not involving consumers or business competitors. Absent legislative intervention, just what kind of plaintiffs and circumstances will constitute appropriate parties and predicates for private actions under the statute will be determined in the common law of LUTPA in the coming years.

This part of the Comment explores the possible extent to which LUTPA actions have been made newly available to one particular class of likely claimants—employees. Although the following discussion focuses on LUTPA issues as they relate specifically to employees, many of the same issues will have to be addressed when considering any new class of plaintiffs who might seek to make use of LUTPA.¹¹⁷ Furthermore, the possible strategies for

113. See *infra* Part III.B.1.

114. *Cheremie*, 35 So. 3d at 1064–65 (Johnson, J., concurring).

115. See text accompanying notes 61–70.

116. *Cheremie*, 35 So. 3d at 1065 (Johnson, J. concurring).

117. Specifically, the discussion of whether employer–employee relations will ever be the subject of unfair or deceptive practices involves an issue of equal concern to any other new class of LUTPA plaintiffs. The fact that the definition of “any person,” as used by Louisiana Revised Statutes section 51:1409, is no longer subject to judicial restriction beyond its plain meaning does not necessarily mean that the entire world of persons may be able to complain of an unfair or deceptive practice. Courts may narrowly construe the

employee uses of LUTPA should also indicate, by analogy, opportunities for other types of plaintiffs. The following discussion, then, has value both as a guide for possible LUTPA claims by employees and as a framework within which to consider the possibility of LUTPA actions by other classes of plaintiffs.

The potential availability or non-availability of LUTPA actions to employees after *Cheremie* is discussed as a preliminary matter. Then, LUTPA is examined as a new statutory alternative to the tort of wrongful discharge in violation of public policy and also as a vehicle by which employees can seek redress for violations of statutes that do not themselves provide for private rights of action. Finally, the use of LUTPA is considered as a possible response to an employer's threatened enforcement of an overbroad noncompetition agreement.

A. Employees and LUTPA—Preliminary Concerns

Under the prior business competitor/consumer standing rule, employees were barred by the courts from bringing LUTPA causes of action against their employers.¹¹⁸ At the same time, employers could bring LUTPA actions against former employees who went to work for competitors or started their own competing business.¹¹⁹

The courts of some states have found that employer-employee relations do not fall within the intended scope of their Little FTC Acts.¹²⁰ These conclusions are usually predicated on a court's

phrase "conduct of any trade or commerce" in section 51:1405 in order to deny LUTPA claims for harms tangentially related to an unfair trade practice. Furthermore, showing an "ascertainable loss" as the result of an unfair trade practice may similarly pose problems for new, nontraditional LUTPA claimants. See *infra* Part.III.A.

118. See *W.A. Offshore Equip. Co., Inc. v. Parmatic Filter Corp.*, 767 F. Supp. 125 (E.D. La. 1991); *Davis v. Manpower Int'l, Inc.*, 623 So. 2d 946 (La. Ct. App. 4th 1993); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. Ct. App. 4th 1982).

119. See *NCH Corp. v. Broyles*, 749 F.2d 247 (5th Cir. 1985); *Wyatt v. PO2, Inc.*, 651 So. 2d 359, 361 (La. Ct. App. 2d 1995).

120. See *Muniz v. Kravis*, 757 A.2d 1207, 1213 (Conn. App. Ct. 2000) ("The trial court properly held that an employment relationship does not constitute trade or commerce for purposes of [the Connecticut Unfair Trade Practices Act]."); *Manning v. Zuckerman*, 444 N.E.2d 1262, 1265 (Mass. 1983) ("However, broad as this protection is, we believe that the Legislature did not intend the statute to cover employment contract disputes between employers and the employees who work in the employer's organization. . . ."); *Buie v. Daniel Int'l Corp.*, 289 S.E.2d 118, 120 (N.C. Ct. App. 1982) ("Employment practices fall within the purview of other statutes adopted for that express purpose.");

understanding that the state's legislature intended the statute to apply to the commercial relationships of businesses with consumers and business competitors, and that sufficient protections of employees' interests exist in other statutes.¹²¹

Still, the courts of other states have found room in their unfair trade practices acts to entertain actions brought by employees.¹²² The Supreme Court of Hawaii, for instance, recently held that employees do have standing to bring private actions under Hawaii's unfair trade practices statute.¹²³ This decision was based on a "plain language" reading of the statute's grant of a private action to "any person" in conjunction with the statute's expansive definition of "person."¹²⁴ That this same approach was utilized by the Louisiana Supreme Court to give a service provider standing under LUTPA suggests a similar result might be reached if the court were pressed in the future to decide whether an employee has standing.

It is possible, however, that Louisiana courts might come to see LUTPA's specific concern with unfair or deceptive practices "in the conduct of any trade or commerce"¹²⁵ as precluding employee standing under the act. That is to say, although the definition of "any person" is no longer limited to business competitors and consumers, the statute might still be construed such that conduct arising in the employer-employee relationship cannot constitute a violation of the statute because it does not involve "trade or commerce."¹²⁶ Louisiana courts could easily adopt the argument

Miller v. Fairfield Communities, Inc., 382 S.E.2d 16, 20 (S.C. Ct. App. 1989) (following *Buie*).

121. See *Manning*, 444 N.E.2d at 1264; *Buie*, 289 S.E.2d at 120.

122. See *Matoff v. Brinker Rest. Corp.*, 439 F. Supp. 2d 1035 (C.D. Cal. 2006); *Smith v. 2001 S. Dixie Hwy, Inc.*, 872 So. 2d 992 (Fla. Dist. Ct. App. 4th 2004); *Davis v. Four Seasons Hotel Ltd.*, 228 P.3d 303 (Haw. 2010).

123. *Davis*, 228 P.3d at 312-14 (Banquet server employees brought class action against hotel employers for improper retention of a mandatory "service charge" charged to customers; court found plain language of the statute, as well as statute's legislative history, to support an interpretation giving the employees standing).

124. *Id.* at 309-312; HAW. REV. STAT. § 480-1 (Westlaw 2011) ("'Person' or 'persons' includes individuals, corporations, firms, trusts, partnerships . . . and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country.").

125. LA. REV. STAT. ANN. § 51:1405(A) (Supp. 2011).

126. This issue will be of similar concern to other non-competitor/consumer plaintiffs who seek to use LUTPA. These plaintiffs might include, for example, a student seeking to use LUTPA against a university for what would traditionally be called "educational malpractice," or a losing party to a lawsuit

put forth by courts elsewhere that a state's unfair trade practices act's exclusive concern with acts or practices committed "in the conduct of any trade or commerce" precludes employee actions under the statute because though an employer may engage employees for the purpose of promoting trade or commerce, the employment relationship *is not* trade or commerce for the purposes of the statute.¹²⁷ To do this, a Louisiana court would need to determine that Revised Statutes section 51:1402(9)'s definition of "trade or commerce"¹²⁸ limits section 51:1405's prohibition of unfair practices in the conduct of "trade or commerce" so as to exclude employee actions because plaintiff-employees would not have been parties to the marketplace transactions with which "trade or commerce" is exclusively concerned.¹²⁹ At the same time, though, Louisiana courts could reject this approach on the argument that the "conduct of any trade or commerce"¹³⁰ may encompass activities bound up in or facilitating the trade or commerce, such as the work performed by employees.

seeking to use LUTPA against opposing counsel for using unethical or illegal practices during the suit.

127. *Quimby v. Kimberly Clark Corp.*, 613 A.2d 838, 844 (Conn. App. Ct. 1992) (following *Manning v. Zuckerman*, 444 N.E.2d 1262 (Mass. 1983)). Note, though, that Louisiana Revised Statutes section 51:1402(9) contains a final clause that includes in its "'trade' or 'commerce'" definition "any trade or commerce directly or indirectly affecting the people of the state." LA. REV. STAT. ANN. § 51:1402(9) (Supp. 2011). This language is not present in the correlative Connecticut statute. *See* CONN. GEN. STAT. ANN. § 42-110a (Westlaw 2011).

128. LA. REV. STAT. ANN. § 51:1402(9) (Supp. 2011):

"Trade" or "commerce" means the advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of the state.

129. The Supreme Judicial Court of Massachusetts used this approach in refusing an employee standing under the state's Consumer Protection Act, stating:

Although the statutory language is not without ambiguity, we interpret the reference in § 11 to unfair or deceptive acts committed by "another person who engages in any trade or commerce" to refer to marketplace transactions and not to claims arising from the ordinarily cooperative circumstances of the employment relationship between an employee and the organization of which he is a member.

Manning, 444 N.E.2d at 1265 (emphasis added).

130. LA. REV. STAT. ANN. § 51:1405(A) (Supp. 2011).

Another hurdle for employee actions under LUTPA will be the showing of an “ascertainable loss” of money or property.¹³¹ Where an employee has a contract of employment for a definite term or with specific promises for promotion, the employee will be able to readily identify a loss of future wages if he is wrongfully terminated or denied a promotion as a result of the employer’s use of unfair trade practices. However, an at-will employee does not have a right to continued employment and future wages as a contract employee does, and therefore will have some difficulty in showing the threshold loss necessary to bring the action. A court could dispense with this conceptual roadblock, though, by considering the employee’s reasonable expectation of continued employment to lay the foundation for an “ascertainable loss” of likely wages.¹³² That is, although the at-will employee did not have a right to continued employment, practically speaking it was the employer’s use of the unfair trade practice that has denied him wages that, *ceteris paribus*, he would have continued to receive at least in the immediate future. Louisiana courts have yet to address the meaning of “ascertainable loss” as used in the statute, and so this issue remains a major source of uncertainty for the viability of employee actions under LUTPA.

Because the *Cheremie* decision did not suggest representative examples of the kinds of claimants to whom LUTPA actions would be newly available, there is room for judicial decisions to go either way on the issue of employee actions. It is now up to the courts to decide whether conduct arising in the employer–employee relationship will ever establish a sufficient basis for a LUTPA claim. And if conduct in this relationship might give rise to a LUTPA claim, it is further up to the courts to determine the parameters of this kind of conduct sufficient to state a claim. The following sections seek to illustrate situations in which employee LUTPA actions are likely to arise.

131. LA. REV. STAT. ANN. § 51:1409(A) (Supp. 2011).

132. See *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 818 (Alaska 2005) (“[W]hen an at-will employee is wrongfully discharged, damages are appropriately measured by the likely duration of employment had the wrongful discharge not occurred.”).

B. Actions for Termination or Discrimination by Employers in Furtherance of or Attendant to their Use of Unfair Trade Practices

1. Alternative to Wrongful Discharge in Violation of Public Policy

Louisiana is among the handful of states that do not recognize any public policy exception to the employment-at-will rule.¹³³ The purpose of a public policy exception to employment at will is to identify certain grounds for termination that will support a cause of action for the tort of wrongful discharge.¹³⁴ Public-policy exception cases may be grouped into four broad categories: (1) refusing to perform unlawful acts, (2) the exercise of legal rights, (3) whistleblowing, and (4) performing public duties.¹³⁵ Although Louisiana does not recognize these public policy exceptions to at-will employment for the purposes of a common-law tort action, the legislature has provided many of the same protections by statute in Louisiana Revised Statutes section 23:967.¹³⁶

Before a court can create a public policy exception to employment at will, it must first identify a suitable public policy. Courts tend to find these policies in state statutes and regulations, though some make use of non-legislative sources of policy.¹³⁷ In states that recognize the first type of exception, the public policy of deterring certain conduct, as evidenced by a statute prohibiting that conduct, would allow an employee to bring a wrongful discharge claim if he were terminated for refusing to engage in the conduct. Similarly, Louisiana Revised Statutes section 23:967 prohibits, and makes actionable, the termination of an employee because the employee “[o]bjects to or refuses to participate in an employment act or practice that is in violation of law.”¹³⁸

The same Louisiana case that established the former business competitor/consumer limitation on standing under LUTPA also established Louisiana’s refusal to recognize the tort of wrongful discharge in violation of public policy.¹³⁹ In *Gil v. Metal Services*

133. MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER, ELAINE W. SHOEN, EMPLOYMENT LAW § 9.9, 841 (4th ed. 2010).

134. *Id.*

135. *Id.*

136. LA. REV. STAT. ANN. § 23:967 (2010) (protecting employees in cases of reprisal for whistleblowing or refusing to perform an illegal act).

137. ROTHSTEIN ET AL., *supra* note 133, § 9.9 at 843.

138. LA. REV. STAT. ANN. § 23:967 (2010).

139. *Gil v. Metal Service Corp.*, 412 So. 2d 706, 708 (La. Ct. App. 4th 1982), *writ denied*, 414 So. 2d 379 (La. 1982). The Louisiana Supreme Court, quoting *Gil*, has said that “[a]side from the federal and state statutory exceptions, there

Corp., the plaintiff Gil was a ten-year employee who was terminated for refusing to participate in his employer's practice of removing identification marks from foreign steel so it could be delivered to customers who ordered domestic steel.¹⁴⁰ Gil asserted two claims, one under LUTPA and another under Civil Code article 2315 for wrongful termination of employment.¹⁴¹ Gil did not attempt to use LUTPA as the statutory basis for his requested public policy exception to employment at will. Instead, he argued that Civil Code article 11 (now article 7) proscribes employment contracts that derogate from laws made for the preservation of the public order, and therefore he could not be terminated for breach of an employment contract that required him to engage in illegal activity.¹⁴² Gil's LUTPA claim was predicated on having been fired "in furtherance" of his employer's deceptive practices.¹⁴³ Gil argued that he had standing because he suffered a loss (his termination) due to his employer's use of unfair trade practices. Louisiana's Fourth Circuit Court of Appeal rejected his LUTPA claim because he was not a consumer or business competitor.¹⁴⁴ The court also dismissed his wrongful discharge claim because "Louisiana's traditional and unique deference to legislative authority" precluded the court from entertaining "[b]road policy considerations creating exceptions to employment at will."¹⁴⁵

Because the court immediately dispensed with Gil's LUTPA claim on the standing issue, it provided no intimation as to how it might have dealt with his "in furtherance" theory of a LUTPA action. An at-will employee should theoretically be able to show an ascertainable loss in these situations because LUTPA should here create a statutory-based exception (*not* a public policy

are no "[b]road policy considerations creating exceptions to employment at will and affecting relations between employer and employee." *Quebedeaux v. Dow Chemical Company*, 820 So. 2d 542, 546 (La. 2002).

140. *Gil*, 412 So. 2d at 707.

141. *Id.* Civil Code article 2315(A) states: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." LA. CIV. CODE art. 2315(A) (2011). Louisiana Revised Statutes section 23:967 had not yet been enacted.

142. *Gil*, 412 So. 2d at 707. The relevant portion of old article 11 said, "Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals." *Id.* Current Civil Code article 7 states: "Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity." LA. CIV. CODE art. 7 (2011).

143. *Gil*, 412 So. 2d at 707.

144. *Id.*

145. *Id.* at 707-08.

exception) to employment at will. The loss suffered is analogous to the loss compensated via Revised Statutes section 23:967's award of damages.¹⁴⁶ In much the same way that, under section 23:967, firing an at-will employee who refuses to violate the law creates a recoverable loss where there was none before, the termination of an at-will employee in contravention of LUTPA should also create a recoverable loss.

If an employee can show an ascertainable loss of money or property, then whether the employee can state a successful LUTPA claim will depend on whether the court will find the employer's unfair trade practice sufficiently entwined with the loss such that the employee's loss might be said to be the "result" of the practice, as required by Revised Statutes section 51:1409(A).¹⁴⁷ For guidance on this issue, Louisiana courts might look to some of the federal jurisprudence addressing the ability of employees to bring antitrust actions¹⁴⁸ when their terminations were necessary to effectuate an anticompetitive scheme.¹⁴⁹ One approach is to view the employee's discharge as a direct result of the employer's anticompetitive practice, and to consider the grant of standing to employees in these situations appropriate because it encourages the exposure of anticompetitive practices by persons best positioned to know of them.¹⁵⁰ A contrasting approach is to reject the employee claim because his injury does not flow from the marketplace effects of the employer's anticompetitive practice, and so allowing the employee's action would expand the statute's reach beyond

146. LA. REV. STAT. ANN. § 23:967(C)(2) (2010) ("'Damages' include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal.").

147. LA. REV. STAT. ANN. § 51:1409(A) (Supp. 2010) ("Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages.").

148. 15 U.S.C. § 15(a) (2006) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

149. Compare *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 746 (9th Cir. 1984) (allowing an employee terminated in furtherance of an anticompetitive practice standing to bring antitrust action); *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 843 F. Supp. 759 (D. Me. 1994) (similarly allowing employees to bring an antitrust action); with *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514 (7th Cir. 1982) (holding that former corporate president who was terminated and blacklisted in the industry for refusing to engage in price-fixing scheme could not show "antitrust injury").

150. *Ostrofe*, 730 F.2d at 746-47; see also *Ashmore*, 843 F.Supp. at 765-68.

that which the legislature intended.¹⁵¹ Neither of these approaches is airtight, and either might be applied to LUTPA by analogy.

If Louisiana courts refuse to find that the unfair and deceptive practices prohibited by LUTPA may encompass employer–employee relations,¹⁵² then an employee terminated for his refusal to engage in these practices will be relegated to the use of Revised Statutes section 23:967 to recover for his termination for refusal to participate in a practice that is in violation of the law.¹⁵³ In fact, an action under section 23:967 would usually provide much of the same protections and opportunities for damages, court costs, and attorney’s fees as a LUTPA claim.¹⁵⁴ However, should the courts find employer–employee relations to fall within LUTPA’s scope, there are certain aspects of LUTPA that would make it preferable to section 23:967 as an avenue of redress for an employee who suffers a reprisal for whistleblowing or refusing to participate in an unlawful practice. First, section 23:967 requires an employee to have advised his employer of the violation of the law before he suffered the reprisal in order to recover under the statute.¹⁵⁵ A LUTPA action would not be subject to this restriction. Second, and possibly most important, section 23:967 provides that an employer may be awarded attorney’s fees and court costs from the employee should a court determine that the complained-of practice was not in violation of the law.¹⁵⁶ An employee bringing his claim under LUTPA would only be exposed to similar liability if the court found the suit to have been brought in bad faith or for the purposes of harassment.¹⁵⁷ Finally, where an employer has previously been put on notice by the attorney general that his practices constitute LUTPA violations, the opportunity for treble damages would make the LUTPA claim preferable.

151. *In re Indus. Gas Antitrust Litig.*, 681 F.2d at 518–19.

152. See text accompanying notes 120–130.

153. LA. REV. STAT. ANN. § 23:967 (2010).

154. LA. REV. STAT. ANN. § 23:967(B) (2010) (“If the court finds the provisions of Subsection A of this Section have been violated, the plaintiff may recover from the employer damages, reasonable attorney fees, and court costs.”).

155. LA. REV. STAT. ANN. § 23:967(A) (2010).

156. LA. REV. STAT. ANN. § 23:967(D) (2010) (“If suit or complaint is brought in bad faith or if it should be determined by a court that the employer’s act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.”).

157. LA. REV. STAT. ANN. § 51:1409(A) (Supp. 2011).

2. Termination Actions Not Analogous to Wrongful Discharge in Violation of Public Policy

There may arise some situations, though, where section 23:967 would not be an available alternative for an employee who might nonetheless demonstrate an ascertainable loss as the result of an employer's unfair trade practices. An example of this is found in another Fourth Circuit case, *Davis v. Manpower International*, where the plaintiff-employee was terminated not because she refused to engage in the unfair trade practice, but instead because her usefulness as a collaborator in the unfair practice had run its course.¹⁵⁸ There, the plaintiff had been enticed to leave her job at one employment agency to go to work for and bring her "client list" to a competing agency. Once the new agency had possession of the client list, though, it intentionally manipulated the plaintiff's work environment in order to force her to resign.¹⁵⁹ The argument was that the plaintiff's termination was but the last step in the employer's scheme to misappropriate his competitor's client list. Because she was not a consumer or business competitor, the plaintiff's LUTPA claim was dismissed for lack of standing.¹⁶⁰

The situation presented by this case shows an employee whose termination might be seen as the "result" of an employer's use of an unfair trade practice, but does not involve an employee's whistleblowing or a refusal to participate in an illegal practice as would be necessary for the employee to utilize section 23:967. If courts decide to sanction a theory by which employees can essentially sue for a wrongful discharge under LUTPA, then it will have the added benefit (or accompanying cost) of encompassing both *Gil*-type plaintiffs, who doubly deter unfair trade practices by both refusing to participate and bringing suit after termination, and *Davis*-type plaintiffs, who are decidedly less sympathetic but whose standing could nonetheless aid in deterring unfair trade practices through private enforcement.

C. The Possibility of "Piggybacking": Statutory Violations as a Basis for an Employee's Action under LUTPA?

"Piggybacking" in the context of state unfair trade practices acts refers to the use of violations of other statutes as per se violations of

158. *Davis v. Manpower Int'l, Inc.*, 623 So. 2d 946 (La. Ct. App. 4th 1993).

159. *Id.* at 946.

160. *Id.* at 947.

the unfair trade practices statute.¹⁶¹ In some states, the violation of certain state or federal laws will indeed constitute a per se violation of the state's unfair and deceptive practices law, though the type of statute that can be used in this manner is typically restricted to those that reflect the policies behind the unfair and deceptive practices law.¹⁶² For example, courts have found that a violation of Washington State's usury law is a per se violation of the Washington Consumer Protection Act,¹⁶³ a New York salesman's failure to comply with the Door-to-Door Sales Protection Act triggers the state's unfair and deceptive acts and practices statute,¹⁶⁴ and a Maine builder's violation of the Home Construction Contracts Act also renders him liable for violating the Maine Unfair Trade Practices Act.¹⁶⁵ Some other states, however, consider the violation of related statutes to be completely separate from, and therefore not per se violations of, the state's unfair trade practices act.¹⁶⁶

California's unfair trade practices statute explicitly sanctions piggybacking. Its prohibition of "unlawful"¹⁶⁷ conduct allows the statute to borrow violations of other laws in order to make them independently actionable as "unlawful practices."¹⁶⁸ California restaurant and casino employees have recently been able to use the unfair trade practices statute to bring actions based on a tip-pooling statute that does not provide for a private action itself.¹⁶⁹ After

161. See Victoria L. Knight, Comment, *Unfair Competition: A Comparative Study of its Role in Common and Civil Law Systems*, 53 TUL. L. REV. 164, 188 (1978); Anthony J. Rollo & Roger A. Stetter, *The Private Cause of Action under Louisiana's Unfair Trade Practices and Consumer Protection Law*, 34 LA. B.J. 344, 346-347 (1987).

162. MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:27 (2009).

163. Cuevas v. Montoya, 740 P.2d 858 (Wash. Ct. App. 1987).

164. Rossi v. 21st Century Concepts, Inc., 618 N.Y.S.2d 182 (City Ct. 1994).

165. William Musher, Inc. v. Hull, 667 A.2d 853 (Me. 1995).

166. See Johnson v. Microsoft Corp., 834 N.E.2d 791, 801 (Ohio 2005) (ruling that the legislature created separate statutory schemes for antitrust issues and consumer sales practices, and so statutes dealing with antitrust issues provide the exclusive remedy for such anticompetitive conduct); Laymance v. Vaughn, 857 S.W.2d 36 (Tenn. Ct. App. 1992) (ruling that a violation of Tennessee Home Solicitation Sales Act, either alone or coupled with violation of Federal Trade Commission Cooling-Off Period Rule, without more, is not a per se violation of Tennessee Consumer Protection Act).

167. CAL. BUS. & PROF. CODE § 17200 (West 2008) ("[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice . . .").

168. Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 540 (Cal. 1999).

169. See Matoff v. Brinker Rest. Corp., 439 F. Supp. 2d 1035 (C.D. Cal. 2006); Lu v. Hawaiian Gardens Casino, Inc., 236 P.3d 346 (Cal. 2010).

Cheremie, Louisiana employees may be able to use LUTPA in a similar piggybacking fashion.

It has been argued elsewhere that Louisiana should incorporate piggybacking into LUTPA.¹⁷⁰ This argument is based on the fact that piggybacking has been used in finding violations of section 5 of the FTC Act,¹⁷¹ and that the adoption of piggybacking would be in line with the legislature's intentions to both make LUTPA as broad as section 5 and use private actions as a tool to improve fairness in the marketplace.¹⁷²

Louisiana courts have yet to fully endorse the use of piggybacking in stating LUTPA claims, but the approach has also not been clearly rejected. Cases from Louisiana's circuit courts of appeal indicate a willingness to find the violation of certain statutes to be per se LUTPA violations. The Fourth Circuit has found that where a defendant's conduct allegedly violates the state's antitrust laws, a valid LUTPA claim has been stated.¹⁷³ The Fifth Circuit has found that where a LUTPA claim is based on a statutory violation that was preempted by federal law, the LUTPA claim is similarly preempted, seeming to suggest that piggybacking was otherwise appropriate.¹⁷⁴ The First Circuit has held that statutory violations may give rise to a LUTPA claim, and that the fact that some statutes explicitly state that a violation will constitute an unfair trade practice for the purpose of Louisiana Revised Statutes section 51:1405(A) does not indicate that the legislature intended LUTPA to be inapplicable to violations of statutes without this language.¹⁷⁵ The Second and Third Circuits have found the tort of wrongful repossession to constitute a LUTPA violation.¹⁷⁶

Although Louisiana courts have not uniformly established a practice of recognizing the violation of any particular statute or group of statutes as per se LUTPA violations, the decisions noted above indicate that courts will be unlikely to deny LUTPA claims

170. Knight, *supra* note 161, at 188–89.

171. *Id.* at 188 (citing *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394–95 (1953)); see also Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 271–75 (1980).

172. Knight, *supra* note 161, at 188–89.

173. *Southern Tool & Supply, Inc. v. Beerman Precision, Inc.*, 862 So. 2d 271, 286 (La. Ct. App. 4th 2003).

174. *Murphy v. Cmty. Health Network of Louisiana*, 712 So. 2d 296, 299 (La. Ct. App. 5th 1998).

175. *Capitol House Preservation Company, L.L.C. v. Perryman Consultants, Inc.*, 725 So. 2d 523, 530 (La. Ct. App. 1st 1998).

176. See *Bryant v. Sears Consumer Fin. Corp.*, 617 So. 2d 1197 (La. Ct. App. 3d 1993); *Jones v. Petty*, 577 So. 2d 821 (La. Ct. App. 2d 1991); *Moore v. Goodyear Tire & Rubber Co.*, 364 So. 2d 630 (La. Ct. App. 2d 1978).

based on the violation of laws closely related in purpose to LUTPA. This should not be surprising, given the judicial custom of finding an unfair trade practice where conduct “offends established public policy and . . . is immoral, unethical, oppressive, unscrupulous, or substantially injurious.”¹⁷⁷ The likelihood that courts will recognize statutory violations that harm consumers or disrupt fair competition as coincidental LUTPA violations suggests that LUTPA may serve as a vehicle for plaintiffs to bring suit for violations of statutes that do not themselves provide for private actions. And, now that standing to bring a private action under LUTPA is no longer limited to business competitors and consumers, a variety of new plaintiffs can test LUTPA’s piggybacking waters.

Certain state employment laws, namely three statutes within Part III of the “Miscellaneous Provisions” chapter of Louisiana’s Labor and Worker’s Compensation laws, entitled “Interference with Individual Rights,”¹⁷⁸ illustrate how piggybacking under LUTPA may create new actions for employees. Louisiana Revised Statutes sections 23:962, 963, and 964, further explained below, do not expressly create a private action for affected employees. A search of reported cases similarly does not indicate whether these statutes can support a private action. An employee who seeks to use one of these statutes as the basis for a LUTPA claim can, however, argue that the employer’s statutory violation has both caused a loss to the employee and injured competition by allowing the employer to avoid the costs associated with compliance, which the employer’s competitors continue to bear.¹⁷⁹

Louisiana Revised Statutes section 23:962 prohibits an employer from discharging employees on account of their political opinions or attempting to control its employees’ votes by any contract or agreement.¹⁸⁰ In controlling the political activities and

177. *Cheremie Serv., Inc. v. Shell Deepwater Prod., Inc.*, 35 So. 3d 1053, 1059 (La. 2010).

178. LA. REV. STAT. ANN. §§ 23:961–967 (2010).

179. *See Averitt, supra* note 171, at 274 (“Most regulatory statutes involve substantial compliance costs to the subject firm. Labor laws, EPA regulations, and OSHA rules come to mind by way of examples. A firm which purposely violates any of these rules can realize significant cost savings, and those savings can translate into a competitive advantage over companies that have complied with the relevant law.”).

180. LA. REV. STAT. ANN. § 23:962 (2010) states that:

Any planter, manager, overseer or other employer of laborers who, previous to the expiration of the term of service of any laborer in his employ or under his control, discharges such laborer on account of his political opinions, or attempts to control the suffrage or vote of such laborer by any contract or agreement whatever, shall be fined not less

votes of its employees, an employer who successfully violates this statute obtains an advantage over its law-abiding competitors who do not get the same added value from their employees. A violation of section 23:944, which prohibits the discharge of or discrimination against employees who testify at labor investigations,¹⁸¹ would vest similar advantages in the employer over its law-abiding competitors who do not enjoy the benefits of a workforce discouraged from cooperating with labor investigations.

Louisiana Revised Statutes section 23:963 prohibits an employer from coercing employees into purchasing or refraining from purchasing merchandise from a particular seller.¹⁸² A violation of this statute would be exemplified by the case of an employer who requires its employees to make purchases from the “company store.”¹⁸³ The violating employer obviously harms competition in the market for the merchandise in question, and the employee suffers a loss resulting from either his discharge or punishment for failure to cooperate, or, if applicable, the higher prices he paid to the employer’s preferred seller.

An employee’s use of piggybacking under LUTPA might also include an action based on a termination that allowed the employer to restock his workforce with employees whose employment is in violation of the law, such as those commonly referred to as “undocumented workers.” The possibility that the hiring of persons not lawfully able to work in the country constitutes an unfair trade practice has been discussed elsewhere.¹⁸⁴

While the use of LUTPA as an alternative to wrongful discharge in violation of public policy would be limited to specific circumstances and might not present certain employees with any opportunities not already provided by Revised Statutes section 23:967, the use of piggybacking would establish a broader base

than one hundred dollars, nor more than five hundred dollars and imprisoned for not more than one year.

181. LA. REV. STAT. ANN. § 23:964 (2010).

182. LA. REV. STAT. ANN. § 23:963 (2010).

183. See *Deon v. Kirby Lumber Co.*, 111 So. 55 (La. 1926). For a more modern version of the story in which the employee actually sought damages under Florida’s unfair trade practices statute, see *Smith v. 2001 South Dixie Highway, Inc.*, 872 So. 2d 992 (Fla. Dist. Ct. App. 4th 2004) (automobile dealership employee terminated for purchasing an automobile from a competing dealership).

184. See Kevin S. Marshall, *The Unfair Trade Practice of Hiring Illegal Alien Workers*, 11 U. PA. J. BUS. L. 49 (2008). “The mere act of hiring an illegal worker does not necessarily translate into an unfair trade practice. Nevertheless, if such an act creates a market-distorting, horizontal competitive advantage for the hiring firm, then the illegal act may potentially constitute an unfair trade practice.” *Id.* at 52.

from which employees might launch LUTPA claims. If an employee can connect his loss to a statutory violation that harms consumers or competition, then he might be able to state a LUTPA claim and achieve some recovery where he otherwise could not. The extent to which Louisiana courts will accept piggybacking under LUTPA remains unclear, but the value of this strategy for plaintiff-employees will eventually be borne out, should the courts, in fact, choose to sanction employee actions under the statute.

D. Response to an Overbroad Noncompetition Agreement

Noncompetition agreements, also called covenants not to compete, are instruments by which an employer may prevent or restrict employee competition after an employee's termination or voluntary separation from the employer. In Louisiana, these agreements are only valid if they fit within the confines of Louisiana Revised Statutes section 23:921, which limits, among other things, the duration and geographical reach of such agreements.¹⁸⁵ A noncompetition agreement is overbroad if its terms seek to restrict employee competition beyond that which is permitted by section 23:921.¹⁸⁶ The Louisiana Supreme Court has recognized that Louisiana has long had a strong public policy disfavoring noncompetition agreements between employers and employees.¹⁸⁷ Because these agreements are in derogation of the common right and hinder a person's ability to support himself, they are to be strictly construed against the party seeking their enforcement.¹⁸⁸

The protections offered to an employee by Louisiana's strong public policy against noncompetition agreements would appear to put an employee in a very good position should a former employer seek to enforce an overbroad noncompetition agreement so as to restrict or foreclose competition from the employee. Two recent

185. LA. REV. STAT. ANN § 23:921 (2010) ("A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.").

186. Carey C. Lyon, Comment, *Oppress the Employee: Louisiana's Approach to Noncompetition Agreements*, 61 LA. L. REV. 605, 614-625 (2001).

187. SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294, 298 (La. 2001) ("Louisiana's strong public policy restricting these types of agreements is based upon an underlying state desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden.").

188. *Id.*

developments in Louisiana's law of covenants not to compete, however, have chipped away at the employee's protected position.¹⁸⁹ These developments favoring employers may be partially offset by an employee's use of a LUTPA claim in response to the threatened or attempted enforcement of an overbroad noncompetition agreement.

One major erosion of an employee's protections in the law of noncompetition agreements came with the legislature's 2003 amendment of Revised Statutes section 23:921, which said that a former employee's "carrying on or engaging in a business similar to that of the employer,"¹⁹⁰ which noncompetition agreements may restrict includes becoming employed by an already existing competing firm.¹⁹¹ The Louisiana Supreme Court had previously construed section 23:921 to only allow noncompetition agreements to prevent an employee from starting a competing business.¹⁹² Thus, employers now have a wider range of competition that may be restricted through a covenant not to compete.¹⁹³

Beyond this, the Louisiana Supreme Court has sanctioned the use of severability clauses in noncompetition agreements.¹⁹⁴ This means that a noncompetition agreement can contain language that will preserve the enforceable provisions of the agreement should certain provisions of the agreement be found invalid and unenforceable. This gives an employer an incentive to test the limits of Revised Statutes section 23:921 when entering into a noncompetition agreement with his employee. An employer may also be encouraged to include some overbroad provisions in the agreement in the hopes that the employee will never challenge it and the agreement can simply operate *in terrorem*.¹⁹⁵ In such a case, the employer is comforted by the knowledge that if part of the agreement is invalidated, some valid restrictions on competition in the agreement will still persist. The possibility that an employer will be faced with an employee's LUTPA claim should the employer threaten or attempt to enforce an overbroad noncompetition agreement can provide a counterbalance to the

189. See Daniel S. Terrell, Note, *The Louisiana Legislature's Response to SWAT 24 Shreveport Bossier, Inc. v. Bond: The Noncompete Pendulum Swings Toward Debt Peonage. Will the Judiciary's Answer Achieve the Fragile Employer-Employee Balance?*, 64 LA. L. REV. 699 (2004).

190. LA. REV. STAT. ANN § 23:921(C) (2010).

191. Act No. 428, 2003 La. Acts 1791, § 1 (codified at LA. REV. STAT. ANN § 23:921(D) (2010)).

192. SWAT 24, 808 So. 2d at 307.

193. Green Clinic, L.L.C. v. Finley, 30 So. 3d 1094 (La. Ct. App. 2d 2010).

194. SWAT 24, 808 So. 2d. at 309.

195. Terrell, *supra* note 189, at 718.

recently enhanced opportunities and incentives to restrict competition from former employees.

Because the attempted enforcement of an overbroad noncompetition agreement actually involves business competitors, reconventional LUTPA actions were theoretically available to the competing former employee prior to *Cheremie*. Indeed, this strategy was tried in the past, though its use and nature have not been thoroughly examined by the courts. The Louisiana Supreme Court suggested in a 1989 decision that there exists an obligation not to enforce an illegal noncompetition agreement, and that a breach of this obligation is actionable under LUTPA.¹⁹⁶ However, the court did not go on to apply this legal principle because the plaintiff's action was barred by *res judicata*.¹⁹⁷ An employee's use of LUTPA in response to an overbroad noncompetition agreement has also been considered by one of Louisiana's courts of appeal, though the employee in that case was unsuccessful in his LUTPA claim because he had been thriving in his competition with his former employer.¹⁹⁸ The employee thus could not show any ascertainable loss as a result of the attempted enforcement of the unenforceable agreement.¹⁹⁹ Finally, an employee's LUTPA action against his former employer based on the threatened enforcement of a noncompetition agreement has been heard post-*Cheremie* by one of Louisiana's U.S. District Courts.²⁰⁰ In that case, however, the court dismissed the plaintiff-employee's LUTPA claim for lack of evidence that the defendant-employer did not reasonably believe in the enforceability of the noncompetition agreement.²⁰¹ The elements of an employee's LUTPA action were not examined in the opinion on account of the plaintiff's failure to meet the threshold issue of the employer's lack of a reasonable belief in the enforceability of the agreement.

196. *Preis v. Standard Coffee Serv. Co.*, 545 So. 2d 1010, 1013 (La. 1989).

197. *Id.*

198. *Barbe v. A.A. Harmon & Co.*, 705 So. 2d 1210, 1221 (La. Ct. App. 4th 1998).

199. *Id.*

200. *Corley v. Se. Metals Mfg. Co., Inc.*, 2011 WL 3665015 (W.D. La. Aug. 19, 2011).

201. *Id.* at *7. The court noted that:

A party may threaten to avail itself of any legal right and, in doing so, does not foment undue duress unless the right is abused or the threat of action made in bad faith. Though it may be eventually learned or proven that the threatening party possesses no such legal right, the threat of legal action is still proper unless it is proven that the threatening party lacked a reasonable belief that the cause of action existed at the time the threat was made.

Id. at * 5 (citations omitted).

The importance of *Cheramie* to the law of covenants not to compete is that the ruling may now allow a current employee or non-competing former employee to bring a LUTPA action based on an employer's *threatened* enforcement of a noncompetition agreement. An employee who is restrained from competing due to his former employer's threats of enforcement (or attempted enforcement) of an overbroad noncompetition agreement is likely to satisfy all the necessary elements of a LUTPA claim. Should the agreement be deemed unenforceable, the employer has necessarily acted in contravention of a "strong public policy" in order to restrain the activities of his former employer.²⁰² This should be sufficient to satisfy the definitional requirement of an unfair trade practice that the practice offend public policy and be unethical, oppressive, or substantially injurious,²⁰³ though as a matter of fairness a prudent court should take the employer's reasonable belief in the validity of the agreement into account before finding a LUTPA violation in these cases. The employee suffers a loss in his abstention or exclusion from participating in a market for which his particular skill set and training presumably give him a competitive advantage. Whatever chilling effect a former employee's use of LUTPA may have on the attempted enforcement of legitimate noncompetition agreements should be tempered by the fact that LUTPA claims brought in bad faith or for the purposes of harassment will result in attorney's fees and costs being awarded to the defendant.

IV. CONCLUSION

After the Louisiana Supreme Court's ruling in *Cheramie*, there exists a wide opportunity for significant growth in the possible uses of the private action provided by the Louisiana Unfair Trade Practices Act. The private action is no longer the sole concern of business competitors and consumers: "any person," broadly defined, who can show any ascertainable loss of money or property resulting from another's use of unfair trade practices will now have standing to bring a private action under LUTPA. But because unfair trade practices are not legislatively defined and must be determined on a case-by-case basis, it is up to Louisiana courts to determine what new kinds of plaintiffs and circumstances will be sufficient to uphold a LUTPA claim. Though the definition of "any person" is no longer subject to any judicially conceived restrictions beyond its plain meaning, what conduct will constitute an unfair

202. See *supra* note 187 and accompanying text.

203. See *supra* note 37 and accompanying text.

trade practice is still subject to judicially imposed limitations.²⁰⁴ Moreover, the causal link between the unfair trade practice and a plaintiff's ascertainable loss must still be proven.²⁰⁵

It is uncertain whether courts will choose to find unfair trade practices in the dealings between individuals who are not business competitors, consumers, or service providers in situations analogous to those presented in *Cheremie*, but it is entirely possible that they will do so. Employees compose one group of plaintiffs who appear to be well-positioned to use private actions under LUTPA to their advantage. First, employees whose firings occurred "in furtherance" of an unfair trade practice may have a new statutory alternative to the tort of wrongful discharge in violation of public policy, a tort that Louisiana, in contrast to the majority of other states, has refused to recognize. Second, insofar as Louisiana courts will permit the practice of piggybacking under LUTPA, the statute may now provide a private right of action for harm suffered as a result of employer conduct in contravention of other statutes that do not themselves provide for private actions. Finally, an employee may now be able to use LUTPA in response to an employer's threatened enforcement of an overbroad noncompetition agreement.

Though the future composition of private actions under LUTPA is uncertain, the statute's grant of standing to "any person," along with its broad prohibition and lucrative offer of damages, attorney's fees, and court costs, make it likely that the outlines of LUTPA will be more clearly defined in Louisiana's common law of unfair trade practices in the coming years. Louisiana's courts are now faced with the difficult task of balancing the threat of a flood of LUTPA litigation from myriad non-consumer, non-business-competitor plaintiffs against the potential societal benefits of enhanced private enforcement of Louisiana's prohibition of trade practices that harm consumers and distort markets.

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204. See *supra* Part III.A.

205. See *supra* text accompanying notes 147–51.

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