

Louisiana Law Review

Volume 34 | Number 3

Employment Discrimination: A Title VII Symposium

Symposium: Louisiana's New Consumer Protection

Legislation

Spring 1974

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Repository Citation

James E. Boren, *The Louisiana Unfair Trade Practice and Consumer Protection Act: An Analysis*, 34 La. L. Rev. (1974)

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THE LOUISIANA UNFAIR TRADE PRACTICE AND CONSUMER PROTECTION ACT: AN ANALYSIS

The Louisiana legislature, through the enactment of the Unfair Trade Practices and Consumer Protection Law,¹ has injected new life into two previously exiguous fields of Louisiana law. The Act aids the consumer who has been at the mercy of unscrupulous merchants partly due to the disparities in bargaining power and simultaneously gives businessmen a potent weapon for use against unfair competition by other businessmen.

The Act makes unlawful all unfair or deceptive trade practices or methods of competition.² The legislation is designed to afford redress to any party harmed by such conduct, whether the injured claimant is categorized as a "consumer" or "businessman." The narrow definition of "consumer transaction" which appears at the onset of the Act³ has no significant effect on the broad proscription of unlawful conduct nor on the remedies provided for parties injured thereby.⁴

1. LA. R.S. 51:1401-18 (Supp. 1972). See generally Breeden and Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law*, 20 LA. B.J. 307 (1973); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972); CRIMINAL JUSTICE NEWSLETTER, Feb., 1973.

2. LA. R.S. 51:1405(A) (Supp. 1972).

3. R.S. 51:1402(4) defines the term as "[a]ny transaction involving trade or commerce to a natural person, the subject of which transaction is primarily intended for personal, family or household use."

4. The term "consumer transaction" appears only at section 1418 of the Act, which is entitled "Jurisdiction." Not only does the narrow definition of consumer transaction leave unfettered the broad proscriptions and remedies of the Act, but the section wherein it is found contributes nothing to the jurisdiction of Louisiana courts. State courts, by operation of R.S. 13:3201(a) already have jurisdiction over any non-resident who transacts any business in the state. However, the Act, presumably aspiring to circumvent definitional disputes declares that a *consumer transaction* transpires in Louisiana in either of two situations: (1) when a document signed by a consumer is received by a merchant in the state; (2) when the merchant negotiates in the state for a transaction consummated outside of the state. It is difficult to fashion a situation whereby this provision expands the long arm jurisdiction. See Breeden and Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law*, 20 LA. B.J. 307 (1973). Moreover, this definition must still withstand the constitutional test of minimum contacts." See generally *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe v. Washington*, 326 U.S. 310 (1945); Comment, 26 LA. L. REV. 350 (1966). Further the words "in the state" are not qualified and can be interpreted to mean resident, domiciliary, citizen, or physical location at the time of the occurrence.

The Act provides at section 1418(B) that all other provisions notwithstanding, the Act applies if the consumer is a resident of the state at the time of the consumer transaction and either of the provisions [of section 1418(A)] are applicable. One

Two different methods of attacking unlawful conduct are provided in the Act. The state can initiate action for injunctive relief against a party whose conduct is deemed to be an unfair trade practice,⁵ and the court, in such an action, can order that any injured party be returned to the status quo ante.⁶ In addition, a private cause of action is created by the Act and recovery may be actual or treble damages, including attorney's fees and court costs.⁷

Unfair Trade Practices

Section 1405(A) is perhaps the most consequential portion of the legislation.⁸ It provides 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."⁹ Further elaboration on the concept of "unlawful conduct" is not found within the Act, but this omission may be one of the more laudible aspects of the legislation. Other states have attempted to expressly enumerate unlawful prac-

possible interpretation of this provision is that the Act constitutes an exclusive remedy if a consumer transaction is involved, *i.e.*, to the exclusion of other actions, such as retribution. The more logical interpretation is that section 1418(B) merely adds to the extraneous provisions of section 1418(A). If the former interpretation is obtained, then section 1418(B) is subject to the same constitutional infirmity as is section 1418(C) which declares *inter alia* that all consumer transactions, wherein it is agreed that jurisdiction and venue shall be in another state, are null and void. Article III, section 16 of the Louisiana constitution requires that the title to a section generally direct attention to the purposes of the law. The title to section 1418 ("Jurisdiction") hardly does that. The jurisprudence is to the effect that while the title need not index the contents of the section, if it is misleading or the variance is palpable or totally irreconcilable with the contents, then the statute is unconstitutional. See *State v. Sliger*, 261 La. 999, 261 So. 2d 643 (1972); *Parish of Jefferson v. Louisiana Dept. of Corrections*, 259 La. 1063, 254 So. 2d 582 (1971); *Associated Gen. Cont. of America v. Police Jury*, 225 So. 2d 300 (La. App. 1st Cir. 1969); Comment, 6 LA. L. REV. 72 (1944).

5. LA. R.S. 51:1407 (Supp. 1972).

6. *Id.* 51:1408 (Supp. 1972).

7. *Id.* 51:1409 (Supp. 1972). The mere existence of this broad spectrum of onerous remedies should serve as a deterrent. The qualitative aspects of this consideration are advanced in *Reed, Legislating for the Consumer*, 2 PAC. L.J. 1 (1971).

8. The constitutionality of the statute is currently being tested on the grounds that section 1405(A) is vague, but no decision is reported as of the time of this writing. However, the Supreme Court of Colorado upheld the Colorado Consumer Protection Act [COLO. REV. STAT. 55-5-1 through 55-5-13 (1969 Perm. Supp.)], which is quite similar to the Louisiana Act. See *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660 (Colo. 1972).

9. LA. R.S. 51:1405(A) (Supp. 1972). It should be pointed out that this terminology has been extensively interpreted. One prevailing theme is that an unfair trade practice may include, but it is not limited to, that which the courts call fraud. See *FTC v. Algoma Co.*, 291 U.S. 67, 81 (1934). There the Court also held that the fact that another company has adopted an unfair trade practice is not a defense.

tices, but as a result of an inability to foresee every possible unfair practice, such acts have been circumvented and their effectiveness negated.¹⁰ On the other hand, acts similar to Louisiana's, modeled after section 5 of the Federal Trade Commission Act (FTCA)¹¹ have resulted in a more comprehensive attack on unfair trade practices because of the broad and flexible nature of those laws.¹²

The question then arises whether the federal jurisprudence concerning the FTCA is incorporated in the Louisiana Act.¹³ Several factors strongly point to an affirmative conclusion. First, section 1405(A) of the Louisiana Act and section 5(a)(1) of the FTCA are virtually identical.¹⁴ The Louisiana rule of statutory construction is that the adoption of a statute of the federal government or of another state includes all of the previous authoritative interpretations and constructions of that statute.¹⁵ Secondly, the Louisiana Act exempts from coverage all conduct which complies with section 5(a)(1) of the FTCA.¹⁶ Therefore, practices which contravene section 5(a)(1) of the FTCA could logically be viewed as violations of the Louisiana Act. This exemption, read *in pari materia* with section 1405(A) of the Louisiana Act, is indicative of the legislative intent to adopt the

10. See *FTC v. Cement Inst.*, 333 U.S. 683 (1948); Baker and Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962); Comment, 48 N.C.L. REV. 896 (1970).

11. 15 U.S.C. 45(a)(1) (1970).

12. Breeden and Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law*, 20 LA. B.J. 307 (1973); CRIMINAL JUSTICE NEWSLETTER, Feb., 1973.

13. *Id.* For an analysis of the legislative and judicial history of section 5 of the F.T.C.A. see *FTC v. Keppel and Bro.*, 291 U.S. 304 (1934); Note, 47 TUL. L. REV. 436 (1973); Baker and Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962).

14. LA. R.S. 51:1405(A) (Supp. 1972): "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." 15 U.S.C. § 45 (a)(1) (1970): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." The only significant difference is that Louisiana's Act extends to trade as well as commerce.

15. *State v. Macaluso*, 235 La. 1019, 106 So. 2d 455 (1958); *Standard Oil Co. v. Collector of Revenue*, 210 La. 428, 27 So. 2d 268 (1946); *Burris v. Guest House of Opelousas, Inc.*, 195 So. 2d 173 (La. App. 1st Cir. 1967); *Broussard v. State Farm Mut. Auto. Ins. Co.*, 188 So. 2d 111 (La. App. 3d Cir. 1966), *writ refused*, 249 La. 713, 190 So. 2d 233 (1966); *State v. Baddock*, 170 So. 2d 5 (La. App. 1st Cir. 1964); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. Orl. Cir. 1923); *Succession of Hedden*, 140 So. 851 (La. App. Orl. Cir. 1932).

A recent case casts doubts upon this line of jurisprudence. *L.A. Frey & Sons v. Lafayette Par. Sch. Bd.*, 262 So. 2d 132 (La. App. 3d Cir. 1972) (failed to apply the rule of the Standard Oil case). See *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—State and Local Taxation*, 33 LA. L. REV. 289, 293 (1973).

16. LA. R.S. 51:1406(4) (Supp. 1972).

FTCA interpretations, as opposed to merely adopting as an exemption that which is permissible by FTCA standards. Furthermore, total ambiguity as to what constitutes an unfair trade practice would preclude its use as a guideline for business. If the sixty years of Federal Trade Commission experience are employed, attorneys can more readily advise business as to what constitutes unlawful conduct.¹⁷ Interpreting section 1405(A) in this manner would in no way limit the Louisiana Act, but rather would serve as a solid base from which to expand.

Administration

The legislature has placed the responsibility of administering the Act in four different bodies of state government, two of which were created by the Act. The two main offices are the Governor's Consumer Protection Division¹⁸ (CPD) and the Consumer Protection Division of the Attorney General's Office¹⁹ (Attorney General).

The CPD is the mainstay of the administration of the statute. One of its activities is to conduct public hearings²⁰ to determine the existence of unlawful actions,²¹ to formulate rules and regulations to preclude future violations, and to clarify the ambiguities inherent in section 1405(A).²² Regulations are drawn by the Director of the CPD²³ and must be approved by the Permanent Consumer Advisory Board

17. Comment, 48 N.C.L. Rev. 896, 910 (1970).

18. The Governor's Consumer Protection Division is created in R.S. 51:1403 and its powers are delineated in R.S. 51:1404. The other two state bodies are the Permanent Consumer Advisory Board (see note 24 *infra*) and the local District Attorneys.

19. The mandate from the legislature to the Attorney General is not found in any particular section of the Act, but is rather contained in numerous references throughout the Act. Two potential problems are created by the statute. First, recognition of the potential political conflict between two administrative bodies is cause for some concern in that efficient administration of the Act is contingent on cooperation of the two offices. Another problem is the source of funding of the two new bodies. Both will be involved in areas sensitive to political considerations, and it is from the legislature that the agencies must receive finances. The provisions enabling them to seek federal funds can obviate this dependence to a certain extent, and as a matter of fact, that is the current mainstay of the budget of both operations.

20. La. R.S. 51:1404(A)(1)(a) (Supp. 1972).

21. *Id.* 51:1404(B) (Supp. 1972).

22. *Id.* 51:1405(B) (Supp. 1972).

23. The regulations must be consistent with R.S. 51:1461.1, which deal with trade and commerce. This provision in the Act was apparently included to insure that the regulations do not conflict with provisions previously governing business relations.

(Board)²⁴ and the Attorney General, before adoption.²⁵ To be consistent with state policy regarding the functions of administrative agencies, these regulations must not set forth affirmative conduct, but must merely define what conduct is proscribed by the legislation.²⁶ To guard against the abuse of this rule-making power, the Act establishes a procedure whereby the validity of such regulations may be ascertained by declaratory judgment.²⁷

The CPD and the Attorney General are also involved in the private actions brought under the Act. All plaintiffs are required to give notice of initiation of litigation to the two state bodies and, upon entry of a judgment or decree, plaintiffs must mail a copy thereof to the CPD and Attorney General.²⁸ Presumably, one reason for these provisions is to facilitate the offices' efforts in coordinating developments under the statute. Moreover, if the conduct of which the plain-

24. LA. R.S. 51:1405(C) (Supp. 1972). The Permanent Consumer Advisory Board (Board) is created by the Act. Its seventeen members are appointed by the Governor upon recommendations by a number of non-governmental state organizations. A close examination of the membership reveals that less than a majority are demonstrably consumer-oriented. The chief functions of the Board are to make recommendations to the CPD concerning administration of the Act and to approve the rules and regulations proposed pursuant to 51:1405(B). The public hearings of the CPD, required by R.S. 51:1404(A)(1)(a), generally transpire before the Board, but this is not required by the Act. The By-Laws of the Governor's Office of Consumer Protection, section II(D), require that the Director be present at all meetings of the Board; however, this is not specified in the Act, thus the binding effect is questionable.

25. R.S. 51:1405(B) provides that the rules and regulations must be adopted in the form and manner prescribed by R.S. 49:951-968, which is the chapter setting forth administrative procedure to be followed by state agencies. Two regulations have already been adopted. GOVERNOR'S CONSUMER PROTECTION DIVISION, RULES AND REGULATIONS, Tit. 3, ch. II, § 5001, (multi-level distribution and chain distributor marketing schemes), § 5002 (magazine and periodical subscription sales practices). For an analysis of the attack on "pyramid sales" (section 5001) under section 5 of the FTCA see Dejute, Myers and Wedding, *Wheeler-Lea Versus Pyramidal Sales*, 10 AM. BUS. L.J. 207 (1973). These regulations were approved on September 19, 1973 by the Board.

Proposed regulations are section 5003, (disclosures required in the awarding of prizes or the conduction of demonstration or instruction classes); section 5004, (bait advertising); section 5005, (mobile home parks); and section 5006, (automotive repairs and services). Copies of all regulations and proposed regulations may be obtained from the Secretary of State or from the Governor's Office of Consumer Protection, P.O. Box 44091, Baton Rouge, La. 70804.

26. All regulations should be read subject to the caveat that the legislature cannot abdicate its authority in favor of an administrative agency without violating the Louisiana constitution. LA. CONST. art. II, §§ 1, 2. See *Louisiana St. Bd. of Embalmers v. Britten*, 244 La. 756, 154 So. 2d 389 (1963); *Collector of Rev. v. Olvey*, 238 La. 980, 117 So. 2d 563 (1960); *National Bank of Com. v. Board of Supervisors*, 206 La. 913, 20 So. 2d 264 (1944); *City of Shreveport v. Price*, 142 La. 936, 77 So. 883 (1918).

27. LA. R.S. 51:1405(B) (Supp. 1972).

28. *Id.* 51:1409(B) (Supp. 1972).

tiff complains is egregious, the state might be warranted in initiating, independently of the private action, an action for injunction, pre-
ceded by a temporary restraining order²⁹ to provide interim relief.

The Director of the CPD is authorized with the Attorney General to accept a violator's assurance of voluntary compliance with an order by the CPD.³⁰ The Act apparently requires both the Attorney General and the CPD to agree, and, as a practical matter, that is the current practice of those two offices.³¹

The Attorney General is given the responsibility of investigating violations³² (a power shared with the CPD) and instituting an action for injunctive relief in the name of the state.³³ Section 1404(B) declares, "[t]he attorney general may institute legal proceedings."³⁴ On the other hand, section 1407 provides "[w]henever the director and the attorney general have reason to believe . . . the director may instruct the attorney general to bring an action for injunctive relief."³⁵ Only judicial interpretation will resolve the problem of which body has the power to initiate actions, or to what extent the two bodies may work independently in that regard.

The Act allows the district attorneys throughout the state to act "in the same manner as provided for the attorney general."³⁶ This

29. All of these actions are authorized by R.S. 51:1407.

30. LA. R.S. 51:1410 (Supp. 1972). For significance of voluntary compliance, see text at note 58 *infra*.

31. Interview with Charles Tapp, Director, Governor's Office of Consumer Protection, in Baton Rouge, La., December, 1973.

32. LA. R.S. 51:1404(B) (Supp. 1972). Broad tools to facilitate investigation and remedy inadequate investigative staffs are provided at R.S. 51:1411 (Investigative Demands) and R.S. 51:1412 (Investigative Depositions). The demands are enforceable by contempt orders as provided by section 1413. These two devices are supplemental to other devices which the Attorney General is authorized to use by the laws of Louisiana.

33. LA. R.S. 51:1407 (Supp. 1972). In an analogous situation, the Louisiana supreme court ruled that the Attorney General has the inherent and constitutional right under Article VII, section 56 of the Louisiana Constitution to sue in the state's name to protect the state's interest, without first obtaining the "permission" of the Governor or an agency. *State v. Texas Co.*, 199 La. 846, 7 So.2d 161 (1942); *on remand*, 205 La. 517, 17 So. 2d 569 (1944). The legislature had created a Mineral Board and given the board the power to sue, but that fact did not preclude the Attorney General from bringing suit on a matter within the province of the Mineral Board. If this reasoning is followed, it is likely that the Attorney General can initiate suit under the Act without regard to any action of the CPD.

34. LA. R.S. 51:1404(B) (Supp. 1972).

35. *Id.* 51:1407. However, the Attorney General can initiate similar actions under the general authority provided by R.S. 15:5036. Moreover, it is at least arguable that the "necessary and proper clause" of R.S. 51:1404(A) (6) would enable the legal section of the CPD to initiate such an action.

36. LA. R.S. 51:1417 (Supp. 1972): "District Attorneys and their assistants . . . may institute and prosecute actions hereunder in the same manner as provided for the Attorney General. In such cases, full reports shall be made to the Attorney General

creates 64 additional enforcers of the Act, thus enabling the Attorney General's office to devote its time to the more flagrant state-wide violations. It is uncertain from a reading of the statute whether the broad investigative powers conferred on the Attorney General are likewise, by operation of section 1417, granted to the district attorneys.³⁷

Exemptions from Coverage

Four exemptions from coverage are provided for by the Act.³⁸

1. Distributors of products who use promotional material which is unfair or deceptive are exempt from coverage if the material is prepared by the manufacturer for use by its distributors and if the distributor cooperates with the Attorney General in investigation of the manufacturer, and if the distributor gives assurances of voluntary compliance as provided for in the Act.³⁹ This exemption, unlike the other three granted by the Act,⁴⁰ in no way affects an individual's private action,⁴¹ except of course, that the rules concerning voluntary compliance must be followed.⁴² Hence, only action by the state is barred by compliance with this provision.

2. All actions or transactions subject to the jurisdiction of other enumerated state regulatory agencies are exempted from the Act.⁴³ These areas are generally covered by the statutes creating the listed

and Director including final disposition of the matter." At the time of this writing, there is no reported action under this provision.

However, the same uncertainty as to whether the CPD and Attorney General must act concurrently, might create problems; i.e, it is possible that the CPD must act with the district attorneys.

37. See note 32 *supra*.

38. LA. R.S. 51:1406 (Supp. 1972).

39. *Id.* 51:1406(3) (Supp. 1972). From the wording of the statute, it would appear that all three enumerated elements are necessary for a party to come within the terms of the statute.

40. The other three exemptions provided for R.S. 51:1406 make no reference to private action: it should then follow that, since the legislature was silent as to them, private and state action under the statute are barred by "fitting into" one of the other three exemptions.

41. The pertinent language of R.S. 51:1406(3) reads, "This exemption does not in any way limit the right of action any consumer may have under this Chapter."

42. While section 1406(3) does not refer to the section dealing with assurances of voluntary compliance (section 1410), it seems clear that an assurance given by a party to bring him within the exemption of section 1406(3) would still not be considered an admission of violation. If nothing else, section 1410 follows section 1406 and hence modifies and is paramount thereto.

43. LA. R.S. 51:1406(1) (Supp. 1972) (e.g.: The Louisiana Public Service Commission, State Bank Commission, State Insurance Commission).

agencies or the new Consumer Credit Law.⁴⁴

3. The advertising media is exempt if the medium involved did not have knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement, *and* had no direct financial interest in the sale or distribution of the advertised products.⁴⁵ The absence of any of these elements apparently removes the medium from the exemption.⁴⁶ A finding that the exemption does not apply would seem tantamount to a finding of an unfair practice in that the enumerated elements seem to set forth a standard of conduct for the media.

4. The broadest exemption is "any conduct which complies with Section 5(a)(1) of the FTCA . . . , any rule promulgated pursuant thereto and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations."⁴⁷ It would be speculation to predict how the courts will define "finally adjudicated," but it should be pointed out that an interpretation which permits varying authority will operate detrimentally to the goals of the Act by injecting uncertainty and thereby diminish its value as a deterrent or as a guideline.

Remedies

The statute creates two separate causes of action: one to be instituted by the state,⁴⁸ and one to be instituted by the private individual who claims to have been wronged.⁴⁹ When the Director and the Attorney General have reason to believe that a person⁵⁰ is engaged in an unlawful act, action for injunction may be brought against the offender in the name of the state.⁵¹ In that case, there is no requirement

44. *Id.* 9:3510-3568 (Supp. 1972).

45. *Id.* 51:1406(2) (Emphasis added.)

46. LA. R.S. 51:1406(2) (Supp. 1972): "Acts done . . . when the publisher . . . did not have knowledge of the false . . . character of the advertisement, did not prepare the advertisement *and* did not have any direct financial interest" (Emphasis added.)

47. *Id.* 51:1406(4) (Supp. 1972).

48. *Id.* 51:1407, 1408 (Supp. 1972).

49. *Id.* 51:1409 (Supp. 1972). Special jurisdictional provisions are created by the Act. See note 4 *supra*.

50. "Person" is defined broadly at R.S. 51:1402(9) to mean "a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity."

51. R.S. 51:1407, in addition to authorizing the state action, provides that a court may issue a temporary restraining order and that the orders and injunctions issued "*shall* be issued without bond." (Emphasis added.) Because the statute authorizes the state to bring action for injunctive relief, and because injunctive relief is specifically authorized for private actions only at R.S. 51:1410 (assurance of voluntary compliance

that a specific victim of the defendant's unfair trade practice be named;⁵² therefore, the state's evidentiary burden is apparently reduced to merely a showing of a violation. However, if it is shown that there is a party who has been aggrieved, the court may order that the defendant reimburse him for actual damages sustained,⁵³ without any requirement that such a person be a party litigant.⁵⁴

The defendant in such an action may choose to voluntarily comply⁵⁵ with the request of the Attorney General, thereby avoiding further litigation, expense and adverse publicity.⁵⁶ The assurance of voluntary compliance *must* be accepted by both the Director and Attorney General. Such assurances are drafted concurrently by these two

provisions), it is questionable whether injunctions will lie in any other circumstances, such as private actions. That is a logical conclusion to draw from the fact that an individual's remedies are enumerated in the Act and allowing injunctions may not have been what a politically conscious legislature had in mind.

LA. CODE CIV. P. art. 3601: "An injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant, *or in other cases specifically provided by law . . .*" (Emphasis added.) It is submitted that R.S. 51:1407 suggests a situation covered by the italicized clause. Therefore, an injunction may be granted merely upon a showing that a party is engaging or is about to engage in an unlawful action and that there is no requirement that the state show irreparable harm.

52. LA. R.S. 51:1407 (Supp. 1972) allows injunction if there is reason to believe that an unlawful event is occurring or is about to occur. Since a contemplated action inherently has no victim, it would seem that the Act to a certain extent proscribes thoughts.

53. *Id.* 51:1408 (Supp. 1972). This provision avoids one common criticism of the FTCA: the F.T.C. is limited to cease and desist orders and is unable to require monetary redress. *But see* Sebert, *Obtaining Monetary Redress for Consumers Through Action by the Federal Trade Commission*, 57 MINN. L. REV. 225 (1972).

54. LA. R.S. 51:1409 (Supp. 1972) bans class actions: "A person may bring an action individually but not in a representative capacity . . ." it appears however that proper utilization of R.S. 51:1408 (all wronged parties submit affidavits demonstrating loss) allows a class action of sorts, brought in the name of the state, but nevertheless circumventing the section 1409 ban. Hence, while fears of business manifested through lobbyists may have precluded the legislature from providing for class actions in the traditional manner, it is still possible for massive numbers of persons to recover actual damages from a party who has committed an act made unlawful by section 1405(A). Many criticisms of the class action are avoided, but the deterrent value of large liability is incorporated in that Act. For extensive analysis of the advantages and disadvantages of class actions in consumer protection legislation see Note, 8 IDAHO L. REV. 322, 328 (1972); *The Uniform Consumer Sales Practices Act, A Panel Discussion*, 27 BUS. LAWYER 139, 142 (Nov., 1971); Gamm, *Regulation of Business Practices for Consumer Protection*, 28 J. MO. B. 438 (Sept., 1972); Eovaldi and Gostrin, *Justice for Consumers: The Mechanics of Redress*, 66 NW. U.L. REV. 281 (1971).

55. LA. R.S. 51:1410 (Supp. 1972).

56. See Note, 8 IDAHO L. REV. 322, 324 (1972).

state offices, to be submitted to and signed by the offender.⁵⁷ This assurance does not bar a civil action by a private party,⁵⁸ but the statute provides that it does *not* constitute "an admission of violation for any purpose."⁵⁹

In either situation, whether the party is enjoined or voluntarily complies, the Act grants that party a cause of action to enjoin competing businessmen engaged in comparable activity.⁶⁰ The Act leaves open several crucial questions in this area. It would seem that an assurance of voluntary compliance given by one businessman would not constitute prima facie evidence of unlawfulness for purposes of enjoining other competitors. Another dubiety is the binding effect of the voluntary compliance on the original violator; assuming the defendant in the "secondary action" successfully defends his conduct, is the original violator still bound by the terms of his compliance? Additionally, it is not clear whether the voluntary compliance precludes the court's awarding compensation to aggrieved parties.⁶¹ If that is not the case, then it would seem to follow that the "secondary action" against competitors might also entail the possibility of compensation of aggrieved parties.

57. LA. R.S. 51:1410 (Supp. 1972). Interview with Charles Tapp, Director, Governor's Office of Consumer Protection, in Baton Rouge, La., December, 1973.

58. LA. R.S. 51:1410 (Supp. 1972) merely provides that there shall be assurances of voluntary compliance and dictates the filing procedure. Nowhere in the Act is the effect given, but the last sentence of section 1410 reads, "[s]uch assurance of voluntary compliance shall not be considered an admission of violation for any purpose." The legislature obviously envisioned some other action wherein the assurance would be valuable evidence if not excluded. The action in question apparently is a private civil action under R.S. 51:1409. Moreover, the provision read *in pari materia* demands the conclusion that the state cannot preclude a plaintiff's suit for actual damages sustained merely because the defendant has apologized and promised to be good in the future. Were that the construction, then a serious due process challenge would lie.

59. Notice that the last sentence of R.S. 51:1410 states that the assurance does not constitute "an admission of violation for any purpose." (Emphasis added.) This is distinguished from stating that "the assurance does not constitute an admission." Hence it is arguable that the assurance can be introduced in a trial under the "admission" exception to the hearsay exclusionary rule for any purpose other than an admission of violation such as to show a pre-existing condition, or knowledge of defendant of a standard of care. This construction would effectively eviscerate the provision and would seemingly be contrary to the public policy behind the provision (saving of time and expense of trial by the business voluntarily rectifying an unlawful situation).

60. LA. R.S. 51:1409(D) (Supp. 1972).

61. R.S. 51:1408 allows compensation of parties actually injured as an aspect of the state's action. It is noted that the Act provides no procedural device to implement those restitution orders. This creates additional inquiries. For example, what kind of right does an aggrieved party obtain once the court has ordered that he be reimbursed, and how can he satisfy that right?

A civil penalty of \$5,000 per violation is provided for non-compliance with an injunctive order or refusal to compensate aggrieved parties.⁶² It is conceivable that the court will rule that each day of refusal constitutes a separate violation. Such an interpretation would certainly strengthen the incentive to follow the directives of the court.⁶³

The Act also creates a private cause of action, to be initiated within one year of the transaction or act giving rise to this action,⁶⁴ for any person who suffers ascertainable loss as the result of another's unfair or deceptive trade practice.⁶⁵ The coverage is quite broad because "person" is defined so as to include corporate and other legal entities as well as natural persons.⁶⁶ All successful plaintiffs recover at least actual damages, but it is possible to further recover treble damages, attorney's fees and court costs.

The Act declares that "[i]n the event damages are awarded under this section, the court shall award to the person bringing such action reasonable attorney's fees and costs."⁶⁷ Since the word "damages" is in no way qualified, it would seem that recovery, be it actual or treble, results in a mandatory awarding of those fees. To preclude frivolous utilization of the Act, section 1409(A) declares,

[u]pon a finding by the court that an action under this section

62. LA. R.S. 51:1416 (Supp. 1972).

63. The statute makes no provision for, but does not rule out the possibility of, issuance of contempt orders.

64. LA. R.S. 51:1409(E) (Supp. 1972). The statute provides no prescriptive period for initiation of state action, but that is understandable in that the state's action is for injunction which naturally presupposes a violation which exists at the time of the litigation. Moreover, R.S. 51:1408 read with R.S. 51:1407 can be interpreted to require that a party request compensation concurrently with the state's action for injunction. The problem is illustrated by this hypothet: *Business* has been involved in a practice for two years. *Customer* was damaged two years ago, but took no action. *State* sues *Business* for injunction. *Customer's* claim for damages under section 1409 is prescribed, but *Customer* may seek compensation under section 1408. In effect then, *Customer's* action never prescribes and he can always obtain actual damages, providing *State* institutes proceedings for an injunction.

65. LA. R.S. 51:1409(A) (Supp. 1972). A provision of this nature in the South Carolina Consumer Protection Law was praised because it frees the attorney general to deal with the larger, more organized deceptive practices which the consumer would find difficult to challenge. Note, 22 S.C. L. REV. 767 (1970).

66. LA. R.S. 51:1402(9) (Supp. 1972). Nor is the Act subject to the most prevalent criticism of the FTCA: that the F.T.C. has jurisdiction over matters "in commerce" rather than "affecting commerce." See Gamm, *Regulation of Business Practices for Consumer Protection*, 28 J. Mo. B. 438 (1972); Note, 22 S.C. L. REV. 767 (1970). Even the Louisiana definition of "consumer transaction" at section 1402(4) uses the language "involving trade or commerce" rather than "in commerce."

67. LA. R.S. 51:1409(A) (Supp. 1972).

was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney's fees and costs.⁶⁸

The portion of the Act dealing with treble damages is perhaps the most problematic. This provision states that

[i]f the court finds the unfair or deceptive method, act or practice was knowingly used, *after being put on notice* by the director or attorney general, the court shall award three times the actual damages sustained.⁶⁹

Part of the problem revolves around the meaning of the clause, "after being put on notice." A literal interpretation would seem to require the Attorney General or Director to notify the court before it could award treble damages. However, the more probable meaning of the phrase is that if the offender is notified by either of these state officials and nevertheless continues his activity, then the court can award treble damages.⁷⁰ Presumably, once the offender is notified by the state that a specific practice is in contravention of the statute, then any party who thereafter suffers loss by the offender's continuation of that practice should be awarded treble damages. One wonders however, to what extent a slight modification of the practice may vitiate the effect of the original notification.⁷¹

Interpreting the Act to make notice a prerequisite to recovery of treble damages leaves several provisions of the Act without meaning. Most significant is the requirement of a "knowing violation." "Knowingly" is defined by the Act to mean that "the act or practice used was such that a reasonably prudent businessman knew or should have known that the act or practice was in violation of this

68. *Id.* 51:1409(A) (Supp. 1972).

69. *Id.* 51:1409(A) (Supp. 1972) (Emphasis added.) This provision is subject to constitutional attack on the grounds that the substance is broader than the title. The title reads "Private Action," but the interjection of the state into the action (treble damages provision) is certainly not indicated by the title. *See* note 65 *supra*.

70. The Preamble to the Act reads, "[T]o provide for private actions to redover (sic) actual damages and recovery of attorney's fees and costs, and for treble damages where the court finds the knowing use, after notice, of a prohibited act." The commas here do not appear to have been correctly placed either.

71. For example, an offender is notified that his practice of advertising one commodity to attract customers followed by the disparagement of that commodity for the purpose of encouraging the sale of a more expensive good, is in violation of the Act. After the notice, the offender advertises in the same manner, but when the customer enters the store, he is informed that the business is "out" of the advertised good. Both practices are variations of "bait and switch" (*see* note 25 *supra*) but the defendant was put on notice only as to the first.

Chapter."⁷² The apparent function of this provision is to vary the damages according to the flagrancy of the violation; thus the offender who intentionally violates the Act should be held "more liable" than one who inadvertently violates the Act.⁷³ This result does not obtain because the Act further requires notification by the CPD or Attorney General as a prerequisite for recovery of treble damages. Hence, a businessman who was found to have intentionally violated the Act, but who was not put on notice by the state, would be liable only for actual damages. Moreover, it would seem that in virtually every instance, notice by the CPD or Attorney General would constitute "knowledge" for purposes of the first requirement. Therefore, while the Act seems to set forth two separate requirements for treble damages, it has actually blurred the two and made them one. Since notice is required for recovery of treble damages, there is no reason for the provision requiring "knowledge." It follows that the provision which states that violation of a permanent injunction is prima facie evidence of knowledge⁷⁴ is also inconsequential.

The Act creates no standards by which to gauge the advisability of sending notice; the wisdom of allowing a state official, acting without guidelines, to determine whether a plaintiff will recover actual or treble damages, must be questioned. Similarly, this procedure seems to accord new weight to opinions of state officials which have previously been merely persuasive.⁷⁵

The better approach would be that notice by the state official

72. LA. R.S. 51:1402(11) (Supp. 1972).

73. Theoretically, the lawmakers desired to make the amount of damages increase in proportion to the degree of wrongdoing. Compare however, these three hypothetical violators' liability.

A uses a method of advertising which the court rules to be deceptive. A demonstrates that his violation was inadvertent and is therefore liable only for actual damages, attorney's fees, and court costs.

B uses a method of advertising which he believed was lawful. He was notified by the CPD that his act was unlawful, but B's attorney, finding no support for the CPD opinion, advised B to ignore the CPD as constituting only an opinion. B is held by the court to have used a method which the reasonable businessman "should have known" was unlawful, and since he was "warned by the CPD," B must pay treble damages, attorney's fees and court costs.

C uses a method of advertising which is intended to defraud the consumer, thereby "knowingly" and "intentionally" violates the statute. C is not however notified by the CPD and hence will be liable in the same amount as A, the inadvertent violator, and less than B, another inadvertent violator.

74. LA. R.S. 51:1409(C) (Supp. 1972).

75. The general attitude of the courts seems to be that little judicial significance should be accorded Opinions of the Attorney General. See, e.g., *Labit v. Terrebonne*, 49 So. 2d 431, 434 (La. App. 1st Cir. 1950).

merely constitutes one method of putting the offender into the "knowing violator" category. Knowledge would be proven by demonstrating that the offender ignored notification or that he knew or should have known that his practice was in contravention of the Act. This would remove the objectionable aspect of state control over the private cause of action because while the court must still find a violation in fact, it need not make treble damages contingent on the state's notification. Coordination of state policy objectives would still be allowed in that if the state deemed the offender's action particularly outrageous, the state could reduce the plaintiff's evidentiary burden by putting the party on notice, and thereby encourage the defendant to immediately terminate the objectionable practice. Therefore, to effectuate optimum realization of the objectives of the Act, the statute should be amended to require only a *knowing* violation of the Act in order to recover treble damages and to provide that continued practice after notification by the state constitutes a presumption of knowledge.

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